SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 172

I. H. NAKDIMEN, H. S. NAKDIMEN, A. F. HOGE, AND GUS KRONE, PETITIONERS,

VS.

LAZARE BAKER, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JAMES B. McDONOUGH,
G. O. PATTERSON,
EDWARD H. PATTERSON,
Counsel for Petitioners.

INDEX.

Subject Index.

Table of Cases.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. .....

I. H. NAKDIMEN, H. S. NAKDIMEN, A. F. HOGE, AND GUS KRONE, PETITIONERS,

VS.

LAZARE BAKER, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MAY IT PLEASE THE COURT:

Petitioner I. H. Nakdimen, defendant in the District Court of the United States for the Western District of Arkansas, Fort Smith Division, and appellant in the Court of Appeals for the Eighth Circuit in causes Nos. 11190 and 11612 in said court, and also petitioners H. S. Nakdimen, A. F. Hoge and Gus Krone, sureties on the supersedeas

NOTE: There were two appeals from the District Court to the Court of Appeals for the Eighth Circuit. The record in the first appeal is numbered 11190, which we have designated as first record; and in the second appeal 11612, which we have designated as second record. References will be made to these records by "first R. 2," in parenthesis, which means case 11190 and on page 2 thereof. The second appeal will be designated as "second R. 2," which means case 11612 and on page 2 thereof.

bond of I. H. Nakdimen in his appeal from said District Court of the United States to the Court of Appeals for the Eighth Circuit, and who join I. H. Nakdimen as petitioners in his petition for certiorari so that there will be no defect of parties in this cause before the Supreme Court of the United States, respectfully show to this Honorable Court:

A.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This litigation grows out of an oral contract for the purchase and sale of 200 shares of the capital stock of the City National Company, an Arkansas corporation. On December 6, 1935, in Fort Smith, Arkansas, the respondent, Lazare Baker, who was secretary-treasurer of the City National Company, and had been such from its organization, and of which corporation the petitioner, I. H. Nakdimen was president, and said I. H. Nakdimen entered into an oral contract for the purchase and sale of 200 shares of the capital stock of said corporation; Baker agreeing to sell said shares to I. H. Nakdimen and transfer said shares to Celia Nakdimen, wife of I. H. Nakdimen, at the latter's request, and said Baker also agreeing to receive in payment for said shares the non-negotiable promissory note of I. H. Nakdimen for the sum of $13,125.00 due in three years after date, without interest, note payable to Lazare Baker at the City National Bank of Fort Smith, Arkansas, with the right in I. H. Nakdimen, upon receiving sixty days' notice of the maturity of said note, to extend the date of payment for a period of two additional years, and in the event of the extension of said note the amount to be paid at the end

of five years was $13,700.00; and said Baker also to receive the certificate of stock issued to Celia Nakdimen for 200 shares as security for the payment of said note of I. H. Nakdimen, said certificate of stock to be duly endorsed by Celia Nakdimen, and said Baker also to receive the written consent of Celia Nakdimen that said certificate should be so pledged.

The note, which states substantially the terms of the contract, is in this record (first R. 60, 61), and is also found in the last opinion of the Court of Appeals for the Eighth Circuit (second R. 42). The said note, however, does not contain any provision fixing the time when said note and the other documents were to be delivered. The contract of purchase and sale was made between said parties in a conference lasting nearly a whole day (first R. 44, 46) between Baker and his attorney, Emmett Carter, whom Baker had brought from St. Louis, Missouri, to aid him in the sale, on the one side, and I. H. Nakdimen and his son, H. S. Nakdimen, cashier of the bank, on the other. According to Baker, the agreement was reached about four o'clock in the afternoon of said December 6, 1935. After said contract was agreed to, Baker cancelled and surrendered his old certificate of stock (first R. 44), and at the same time issued a new certificate for 200 shares to Celia Nakdimen. The note and the certificate and all other papers that were to be signed by Baker and Nakdimen were signed at the bank at that conference during that afternoon. Celia Nakdimen was not in the conference at the bank, and since Baker's attorney required her signature to the consent and the endorsement of the stock certificate (first R. 68), it was necessary that the papers to be signed by Celia Nakdimen should be taken to the home of I. H.

Nakdimen and his wife. I. H. Nakdimen (first R. 68) volunteered or suggested that he would take the consent and the certificate home for his wife to sign. All the documents were dated that day—December 6, 1935 (first R. 59, 61). Baker himself presented to I. H. Nakdimen (first R. 51) the new certificate of stock for Nakdimen's signature.

"Plaintiff Baker was present when the note was being written up and signed" (first R. 68 and 44). "Everything was agreed to by Mr. Baker and was agreeable to him and his attorney (first R. 68) until said attorney suddenly and without warning, and as they were about to leave the bank, drew out a photostatic copy of a note payable to I. H. Nakdimen for $20,300.00 and dated in 1921, bearing interest at 8% and past due more than fifteen years, and asked Mr. Nakdimen what he intended to do about that." That note had not been mentioned during the entire preceding conference. Afterwards the Circuit Court of Appeals for the Eighth Circuit denied a recovery on that note (97 Fed. (2d) 715). I. H. Nakdimen had for some time been in poor health and was shocked at the production of that note by Baker's attorney (first R. 61) and walked away from said attorney, saying nothing at that time. In a short time, and before Baker and Carter left the bank, I. H. Nakdimen came back into the bank office and Carter again asked him what he was going to do about said note (first R. 68). After Carter brought that matter out, I. H. Nakdimen "said he thought that both deals should be settled at the same time" (first R. 68). There is no evidence to show that either Baker or Carter made any objection or response to that suggestion of I. H. Nakdimen. At that point, this appears in said record:

"Q. Then what did Mr. Carter do after that?
"A. Well, he left the bank with Mr. Baker. I presume he went back to St. Louis" (first R. 68, 69).

The departure of Baker and his attorney ended the conference.

Baker testified (first R. 44) that I. H. Nakdimen said in the conference that he would take the consent and the note home for his wife to sign the certificate and the consent and would deliver them the next morning; and that (first R. 51) he and I. H. Nakdimen signed the new certificate of stock and "that was put with the note." The evidence of H. S. Nakdimen (first R. 69) showed the consent and the certificate were taken to the home of Celia and I. H. Nakdimen and were signed by her that night at home, and that was after the unpleasantness which had arisen over the other note. There is no evidence to show whether the note, at the time that the certificate was placed with it, was in the possession of Baker or in the possession of I. H. Nakdimen. H. S. Nakdimen was asked (first R. 67) "what was the understanding as to when the *stock certificate* should be returned." He answered, "It was to be delivered the next day."

The District Court (second R. 23) found that Nakdimen "after he had received the requested information," and on February 3, 1936, refused to deliver the note and the other documents. On that point the Court of Appeals in its last opinion (second R. 43) found that "Baker undertook *to procure the requested information and failed.*" Neither finding is supported by any evidence. Baker testified that he (first R. 46) "did obtain for Mr. Nakdimen the information which he requested." He was

then asked the time he received that information and delivered it to Nakdimen. He answered, "I got a copy of Mr. Carter's letter to Mr. Nakdimen dated January 14," *but he never stated when he delivered the information to Nakdimen.*

Plaintiff Baker in his evidence admits in substance and effect that on the morning of December 7, 1935, he went to the bank and his office, and cleared out his desk of the personal articles therein, and then went downstairs "and asked Mr. Nakdimen if he had the consent *signed* and the note *ready* to deliver, and he said he had changed his mind about signing that note until another claim against him was settled" (first R. 44). After some argument between I. H. Nakdimen and Lazare Baker, the latter said "and Mr. Nakdimen then asked witness (Baker) for certain documents concerning the other note. He said he would have to have those *delivered first.*" Baker then wired his attorney, Carter, in St. Louis, and wrote his father-in-law, Sommer, asking that the documents requested by Nakdimen be furnished him (first R. 44, 45). Baker's evidence shows, as above indicated, that he obtained the information (first R. 46); but it does not show when he delivered same to I. H. Nakdimen if at all. It is believed that said information, if it was delivered, was delivered after February 3 and on or before February 9, 1936.

The District Judge asked Baker if Nakdimen made an absolute refusal. Baker answered (first R. 45), "He just said he decided he would not *sign* the note until I got this information for him." Baker several times refers to the so-called refusal of Nakdimen to deliver the note, but in every instance he connects it with the qualification either that Nakdimen wanted that information

first or that Nakdimen wanted the two cases settled together. The language of Baker at one time (first R. 46) was that Nakdimen "thought I could bring pressure to bear on that." That remark referred to the settlement of the other claim. In every instance when Baker speaks of Nakdimen's refusal, said refusal is qualified in the way above indicated. Baker owned one claim and the other was the claim of his grandmother's estate.

Another fact shows the waiver by Baker of the time of delivery, which waiver took place on December 7, 1935. It is undisputed that Baker purchased 200 shares of stock in the company with the understanding that he would become secretary-treasurer. His preparations to leave Fort Smith at once on or about December 7, together with the condition upon which he purchased originally, indicates that he would retire from the office which he held in the company upon the sale of his stock. It is undisputed that the agreed price (first R. 51) was arrived at by deducting from the $20,000.00 the amount paid by the company to Baker as salary *up to December 6, 1935.* The deduction was his salary *up to that date. Hence all salary he received after that date was his own, and was a consideration to him for the delay.* Baker did not resign then. By not resigning, he received the salary up to February 21, 1936 (first R. 43). He remained with the company, *drawing his salary,* until February 21, 1936 (first R. 43). He left Fort Smith (first R. 42) in March —after he had assumed the contract was still in force, and after he had demanded performance of Nakdimen on February 3, 1936, and after Nakdimen had tendered full performance on February 9, 1936, and after his refusal to accept the documents on that date. He had lived in Fort Smith from March, 1931, to March, 1936. His

resignation, as above shown, was on February 21, 1936. Apparently H. S. Nakdimen (first R. 68) confirming the fact that Baker waived the delivery on December 7, when asked as to the understanding when the *stock certificate* should be returned, answered (first R. 68): "It was to be delivered the next day. Lazare was not leaving town that day or the next," indicating by fair inference that a delivery any time before Baker left town would be satisfactory.

It is undisputed that on February 3, 1936, Baker offered full performance and demanded full performance of I. H. Nakdimen (first R. 45, 46). It is also undisputed that on February 9, 1936, Nakdimen offered all the documents, offering full and complete performance of the contract. Baker refused to accept the note and the other documents on the ground that Nakdimen should pay his traveling expenses and attorney's fees (first R. 45), and not on the ground of delay, or that it was too late. On cross examination Baker stated that the traveling expenses to St. Louis were "not part of the expense witness requested Nakdimen to make up" (first R. 47). Apparently the Court of Appeals in its opinion (second R. 43) treats the whole of the expense as being demanded by Baker, although Baker did not so testify, and did not specify the amount of his traveling expense that he wanted, nor what business he was traveling on at the time, nor did he at any time make any statement as to the amount of the attorney's fee nor the traveling expenses. He claimed that he had employed a local attorney, although he does not refer to him at the time as a "local attorney," between February 3, 1936, and February 9, 1936, but he did not bring his suit until nearly eleven months thereafter, which was brought October 27, 1936.

I. H. Nakdimen (first R. 62) and H. S. Nakdimen both testified that the documents were tendered to Baker on December 7 and he was told a number of times that the documents were his. H. S. Nakdimen testified that the documents were held as the property of Baker as he had refused to receive same (first R. 72), and they were tendered to Baker repeatedly (first R. 70, 71, 72, 74).

The petitioners are not requesting the court to pass on issues of fact. The controlling facts are not in dispute. The only conflict in the evidence of Baker and the Nakdimens relates to the offer of delivery of the documents on December 7, 1935, and repeatedly thereafter. The errors of which the petitioners complain are errors of law, based in part upon an erroneous view of the law and to some extent an erroneous view of the facts.

By stipulation the evidence in the printed record on the first appeal, No. 11190, is the evidence on the second appeal (second R. 35), 11612.

A BRIEF SUGGESTION AS TO THE PLEADINGS.

The respondent brought his conversion suit, a tort suit pure and simple, on October 27, 1936, against I. H. Nakdimen and Celia Nakdimen, praying for a judgment against each of them in the sum of $13,125.00 and interest. After that case had long been at issue awaiting trial, Baker filed a new complaint, called an "amended petition," which was filed on September 10, 1937 (first R. 2). The only additions to, and changes in, the old complaint are shown in defendant's motion to strike (first R. 14) directed to the amended petition. Those additions were as follows:

"Plaintiff further states that plaintiff has, as aforesaid, performed his part of said agreement, and defendants have received the benefit thereof and have converted said property to their and each of their own use."

And also:

"Plaintiff further states that the conduct of said I. H. Nakdimen and of his wife was wrongful, willful, deceitful and fraudulent and was intentionally committed."

And also:

"and prays further punitive damages against said defendants, I. H. Nakdimen and Celia Nakdimen, his wife, in the sum of $10,000,00."

At the conclusion of the evidence at that trial, Baker dismissed as to Celia Nakdimen (first R. 82).

That conversion suit was tried by the court and a jury. The court instructed the jury in substance (first R. 86) that if they found there was conversion they would find for the plaintiff in the sum of $13,125.00 and certain interest, and further (first R. 86): "On the other hand, if you find for the defendant, *the result is that the note and the obligations in the case, the stock—I mean the note obligation and the stock, having been tendered into court here, will be for the plaintiff to accept. In other words, if you find for the plaintiff, you pay them (him) $13,125.00. If you find for the defendant, then they (he) follow the terms of the contract and agreement and accept the note of $13,125.00.*" The court then told the jury that even if they found for the defendant, the de-

fendant would still owe the plaintiff the amount of the note.

The Court of Appeals on the first appeal held that the case was controlled by the case of *Grist* v. *Lee*, 124 Ark. 206. That case in its facts was identical with this case, and in that case the Supreme Court of Arkansas reversed *and dismissed the case*, holding that after a conversion suit had been lost, *the plaintiff could not convert his suit into one for damages for breach of contract.* The petitioner contends that the conversion suit was in conflict with a suit for damages, and hence the latter could not be maintained. The petitioner also contends that when the respondent demanded performance of the contract of Nakdimen on February 3, 1936, he waived any breach by Nakdimen, if there was one. The other questions are more fully stated in the statement of the reasons for the writ.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Circuit Court of Appeals for the Eighth Circuit has decided important questions of local law in a way probably in conflict with applicable local decisions of the Supreme Court of Arkansas, which questions are as follows:

1. Under the laws of Arkansas and the decisions of the Supreme Court of that state, when the respondent brought his conversion suit and the same was decided

against him, he cannot amend his complaint so as to make it a suit for damages for breach of contract, and therefore the "Second Amended Petition" should have been dismissed on the first appeal, and the same question arises on the second appeal. The federal courts decided in conflict with the Arkansas law that the complaint could be so amended.

2. Under Arkansas laws and decisions, when respondent brought a conversion suit, which is a suit in tort, said respondent cannot be permitted to convert said suit by amending into a suit asking damages for breach of contract, since the conversion suit and the suit for breach of contract are contradictory and conflicting.

3. Under the laws of Arkansas, a litigant cannot occupy conflicting positions in seeking relief for claimed wrongs. The respondent attempts to do that in bringing a conversion suit and then attempting to convert the same into a suit for damages for breach of contract.

4. Under the laws of Arkansas, a contract is not breached unless there is an absolute and unqualified refusal to perform. The language used by Nakdimen as given by Baker does not constitute an absolute and unqualified refusal to perform.

5. Under the laws of Arkansas, if Nakdimen failed to tender a delivery of the note and other documents on December 7, 1935, Baker had the right to waive delivery on that day by consenting and acquiescing in the delay requested by Nakdimen. Baker by his own evidence, and

by the benefit which he derived by drawing his salary until February 21, 1936, did waive delivery on December 7, 1935.

6. Under the laws of Arkansas, when Baker on February 3, 1936, offered performance and demanded performance on the part of Nakdimen, he treated the contract as existing and alive for both himself and Nakdimen, and he thereby waived any previous breach by Nakdimen, if there was one.

7. Under the laws of Arkansas, a court of law has no jurisdiction to enforce specific performance. When Baker on February 3, 1936, demanded performance by Nakdimen and fixed no time within which Nakdimen should perform, the law gave Nakdimen the right to perform within a reasonable time. Baker, by his offer and demand of February 3, 1936, waived the previous breach by Nakdimen, if there was one, and kept the contract alive, and Nakdimen therefore had the right to offer performance on February 9, 1936, and Baker breached the contract by refusing to receive the note and the other documents on that day. Nakdimen was therefore entitled to a decree for specific performance.

8. Under the laws of Arkansas and the facts in this case, there was no breach of the contract by Nakdimen on December 7, 1935.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals

for the Eighth Circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases numbered and entitled on its docket, Nos. 11190 and 11612, I. H. Nakdimen, appellant, vs. Lazare Baker, appellee, and that said judgment in favor of the appellee may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just, and your petitioners will ever pray.

I. H. Nakdimen,
H. S. Nakdimen,
A. F. Hoge,
Gus Krone,

By JAMES B. MCDONOUGH,
G. O. PATTERSON,
EDWARD H. PATTERSON,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. .....

I. H. NAKDIMEN, H. S. NAKDIMEN, A. F. HOGE, AND GUS KRONE, PETITIONERS,

VS.

LAZARE BAKER, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion of the Court of Appeals for the Eighth Circuit on the first appeal is reported in *Nakdimen* v. *Baker*, 100 Fed. (2d) 195. The opinion on the second appeal has not been yet officially reported. Said opinion is found in second R. 40-48.

II.

JURISDICTION.

1. The jurisdiction of this court to grant the writ of certiorari is found in United States Code, Title 28, Section 347, as amended, and the cases cited in paragraph 4 below.

2. The date of the judgment in the Court of Appeals is May 14, 1940. A petition for a rehearing was filed (second R. 49), and that petition was denied May 27, 1940 (second R. 57). On June 6, 1940, the Circuit Court of Appeals for the Eighth Circuit made an order withholding the mandate for thirty days from and after June 6, 1940, and thereafter if petition for certiorari be duly filed.

3. The "Second Amended Petition" attempts to state a cause of action for damages for breach of contract. Counsel for petitioners do not concede that said amended complaint states a cause of action for breach of contract. It is not alleged therein that there is a breach of contract and damages are not described nor claimed. Candidly, the said Second Amended Petition seems to be a suit to recover on the contract for the amount of the note with interest before it was due. It is not necessary, however, to argue or to determine that question. The opinion of the Court of Appeals, above referred to, decides the several important local questions contrary to the Arkansas law and the decisions of the Supreme Court of Arkansas and contrary to the decisions of this court. Under the decisions of this court, it is error for the federal court to decide important local questions contrary to the decisions of the courts of the state where the action is brought and is pending.

4. The decisions of this court believed to sustain the jurisdiction are as follows:

Erie Railroad Co. v. *Tompkins,* 304 U. S. 64.
Wichita Royalty Co. v. *City National Bank,* 306 U. S. 103.
Texarkana, Texas, v. *Arkansas-Louisiana Gas Co.,* 306 U. S. 188.
Cities Service Oil Co. v. *Dunlap,* Advance Opinions of the Supreme Court of the United States, 1939-1940, page 185.

Federal courts are bound by the applicable principles of state law.

New York Life Ins. Co. v. *Jackson,* 304 U. S. 261.
Hudson v. *Moonier,* 304 U. S. 397.
Railroad Co. v. *Los Angeles Corp.,* 280 U. S. 145.

III.

STATEMENT OF THE CASE.

It is believed that the statement of the case made in the summary and short statement is sufficient, and therefore reference is made to that as a compliance with the rule.

IV.

SPECIFICATION OF ERRORS.

1. The Court of Appeals erred in not dismissing this case when it was determined by that court that the case was controlled by the decision of the Supreme Court of Arkansas in *Grist* v. *Lee,* 124 Ark. 206, said error occurring in both appeals.

2. The Court of Appeals erred in holding that the suit could be changed from a suit in tort to a suit for

damages for breach of contract, and in refusing to dismiss said suit as the Arkansas law required.

3. The Court of Appeals erred in directing and permitting the respondent to occupy conflicting positions in this litigation.

4. The Court of Appeals erred in holding that the petitioner, I. H. Nakdimen, breached the contract on December 7, 1935.

5. The Court of Appeals erred in not holding that Baker, by his own evidence, and by the benefit which he derived from drawing his salary until February 21, 1936, waived delivery on December 7, 1935.

6. The Court of Appeals erred in refusing to hold that Baker, when on February 3, 1936, he demanded performance by Nakdimen, thereby waived any previous breach by Nakdimen, if there was one, and by such demand kept the contract alive for both parties.

7. The Court of Appeals erred in not decreeing specific performance in favor of Nakdimen against Baker.

Specification of error number 8 is embodied in the above.

V.

ARGUMENT.

Summary.

A summary of the points to be argued is fully stated in the above Specification of Errors.

Under the decisions of Arkansas, the cases being cited below, parties who are competent to make a contract are entirely competent to change the terms of that

contract. Assuming that this contract of purchase and sale meant that the note and the other documents were to be delivered to Baker December 7, 1935, there was no wrong on the part of Nakdimen in suggesting the delay on the morning of December 7. A contract is not breached unless there is an unqualified and absolute refusal to perform. Nakdimen's request that Baker obtain for Nakdimen certain information concerning the other note was not unreasonable, in view of the course taken by Baker's attorney and Baker on the day before. Hence it was reasonable in Nakdimen to request the information. Baker was not compelled as a matter of law to consent to the delay. By his own evidence, however, he did consent. Necessarily, if the agreement was that the note and the other documents should be delivered to Baker on December 7, it would follow, in view of the conditions under which Baker bought the stock, that Baker's office in the company as secretary-treasurer would be vacated at the final completion of the contract by delivery of the note and the other documents. Baker acquiesced in the postponement by requesting his attorney and his father-in-law to secure the information. Not only that, he did not resign his position on December 7. He retained that position and drew the salary thereof until February 21, 1936. By his own evidence he makes no request for the delivery of the note and the other documents to him between December 7, 1935, and February 3, 1936. The record is a blank as to when the requested information was delivered to Nakdimen, if at all.

The Court of Appeals in its opinion indicates that a consideration was essential to make valid the agreement of Nakdimen and Baker for the delay in the delivery of the note and other documents. The Arkansas

court has held to the contrary, as will be shown by cases cited below. However, there was a consideration. The consideration was the receipt by Baker of his salary until February 21, 1936. Baker, in discussing his efforts to secure the information, states that he obtained it for Nakdimen; but his language does not justify the conclusion that he delivered it to Nakdimen. Assuming that he did deliver it, he failed to answer the question as to when he delivered it. He states that on February 9 when Nakdimen offered to perform fully and completely, that when he (Baker) took the position that he would not receive the note and the other documents unless Nakdimen would agree to pay indefinite attorney's fees and indefinite traveling expenses, Nakdimen requested him to put the proposition in writing. He says he did put it in writing; and when asked whether Nakdimen responded to the writing, he stated that he received a letter from Mr. McDonough on February 19, 1936. He does not give the proposition which he made, nor does he give the McDonough letter. Two days after he received the McDonough letter he resigned, and left for St. Louis in March.

The first fatal error committed by the Court of Appeals was in not dismissing the case or directing the District Court to dismiss it. Under the rule in Arkansas, as shown by the citation of the Arkansas cases, the case should have been dismissed for the reasons stated in the specification of errors above. That question was preserved throughout the second trial and was embodied in the requests of the defendant for findings of fact and declarations of law. The Court of Appeals suggests that the waiver discussed was not pleaded. Said court overlooks the fact that waiver is a species of estoppel, and

that estoppel was pleaded. In addition to that, the Court of Appeals suggests that the question of waiver was not raised in the court below. That contention is flatly controverted by a reference to second record, page 28, and paragraph 6 of defendant's request for findings of fact, and also by the requests for declarations of law, pages 29-30.

It follows, in our humble judgment, that if we are right in any one of the specifications of error above given, the Court of Appeals committed reversible error by refusing to apply the principles of the laws of Arkansas.

I.

The Court of Appeals erred in not dismissing this case when it was determined by that court that the case was controlled by the decision of the Supreme Court of Arkansas in *Grist* v. *Lee*, 124 Ark. 206, said error occurring in both appeals.

In the first opinion of the Court of Appeals (*Nakdimen* v. *Baker*, 100 Fed. (2d) 195) it was declared plainly that this case was controlled by the decision of the Supreme Court of Arkansas in *Grist* v. *Lee*, 124 Ark. 206; but the court, in our opinion inadvertently misunderstanding the full effect of the decision in Grist vs. Lee, instead of dismissing the case, remanded it and suggested amendments.

The petitioner filed at once in that court a petition for a rehearing, calling attention to the fact that instead of remanding the case the court could enter an order dismissing it, or enter an order directing the District Court to dismiss it. Since the case is controlled by Grist vs.

Lee, a case identically the same as to facts and principles of law, the decision of the court is a plain violation of the rights of the petitioner in failing to grant the relief under the laws of the State of Arkansas. The petition for rehearing was denied.

The mandate was filed in the lower court (second R. 2) January 26, 1939. On February 4, 1939 (second R. 8), the respondent filed what is called "Second Amended Petition." The petitioner filed a motion to dismiss that amended complaint (second R. 11). The third ground of that motion to dismiss has this language:

> "If the present action is one for breach of contract, it is an attempt to change from a tort action to a contract action, and under the decisions of the Arkansas courts that cannot be done, and therefore this cause must be dismissed because it cannot be maintained upon conversion and it cannot be changed from conversion to contract."

The court denied that motion; petitioner excepted, and set up in the answer the same defense, and in the request for findings of fact and conclusions of law (second R. 27) raised the same question. The Court of Appeals on the first appeal correctly held that this case is clearly controlled by the decision of the Supreme Court of Arkansas in *Grist* v. *Lee*, 124 Ark. 206 (second R. 7).

The precise question came before the Supreme Court of Arkansas in the case of *A. F. Shapleigh Hardware Co.* v. *Hamilton*, 70 Ark. 319. That case is controlling, absolutely, on the question under consideration. The complaint in that case, like the one in the case at bar, had alleged some facts which might belong to a suit for damages for breach of contract, and some facts that might be relevant in a complaint on the contract, and

some facts which might be relevant in a conversion suit. In holding that the complaint could not be amended so as to change from a tort suit to a suit for breach of contract, the Supreme Court of Arkansas said:

> "It was error in the court to change the form of the action, by striking out or treating as surplusage the principal allegations—those that give form to the action—because, perchance, there may be facts stated by way of inducement spelled out which would, when put in proper form, have sustained an action *in assumpsit.* The defendant was called upon to answer the allegations of fraud, and not to resist a claim to recover *in assumpsit.* The plaintiff was not, under the complaint, entitled to a verdict and judgment as in an action upon the note. While the code is liberal in disregarding technical defects and omissions in pleading, and in allowing amendments, it does not permit a cause of action to be changed, either because the plaintiff fails to prove the facts necessary to sustain it, or because he has mistaken his remedy, and the force and effect of the allegations of his complaint."

In quoting from Pomeroy's Code Remedies, the Arkansas court in the same case said:

> "By far the most important distinction directly connected with this doctrine is that which subsists between causes of action *ex contractu* and those *ex delicto.* It is settled, by an almost unanimous series of decisions in various states, that if a complaint or petition in terms alleges a cause of action *ex delicto,* for fraud, conversion, or any other kind of tort, and the proof establishes a breach of contract, express or implied, no recovery can be had, and the action must be dismissed, even though by disregarding the averments of tort, and treating them as surplusage, there might be left remaining the necessary and sufficient

allegations, if they stood alone, to show a liability upon the contract." * * * "A party cannot sue in tort and recover in contract or *assumpsit.*"

We respectfully submit that what the court said in said first opinion (second R. 7), "The most that he (Baker) had was a right of action for breach of contract and an equitable lien upon the 200 shares of stock," was *obiter.* It is so because the court declared that that appeal "presents one question necessary to its determination" (second R. 5).

The following authorities sustain that suggestion:

Carroll v. *Lessee of Carroll,* 16 How. (U. S.) 265.
Connor v. *Blackwood,* 176 Ark. 139.
Scruggs v. *State,* 131 Ark. 320.
Payne v. *State,* 124 Ark. 20.
United States v. *Waite* (8 CCA), 33 Fed. (2d) 567.

II.

The Court of Appeals erred in holding that the suit could be changed from a suit in tort to a suit for damages for breach of contract, and in refusing to dismiss said suit as the Arkansas law required.

It is settled law in Arkansas that a cause of action in tort cannot be joined with a cause of action on contract. In so holding in the case of *Unionaid Life Ins. Co.* v. *Crutchfield,* 182 Ark. 825, the Supreme Court of that state, among other things, said:

"It is clear that the evidence to sustain one allegation would be different from that necessary to sustain the other, and therefore they ought not to have been joined."

See, also, *Conant* v. *Storthz,* 69 Ark. 209.

The original amended petition was a plain conversion suit—a suit in tort. The facts alleged therein (first R. 2), as the Court of Appeals held, were insufficient to sustain conversion. The respondent asserted that they were sufficient and that his cause of action against the petitioner was a tort action. The inconsistency of that position is one of the things that absolutely denies his recovery in this. That is not the point here. Said amended petition, being the complaint on which the case was first tried, did not state facts sufficient to constitute a cause of action for breach of contract. The opinion of the Court of Appeals on the first appeal actually amounts to such a holding, and hence it appears that said court suggested an amendment. But there was nothing to amend in the way of a contract action.

Besides, under the laws of Arkansas, as shown elsewhere herein, no party is permitted to change his alleged cause of action from a tort to a contract action, or from a contract action to a tort. When that situation arises, the complaint must be dismissed. The petitioner, at every turn in the case under the second amended complaint, preserved the question that the plaintiff was not entitled to maintain the contract action, but that the complaint must be dismissed. See petitioner's motion to dismiss (second R. 11). Following that, the petitioner made a motion to make the second amended complaint more definite and certain (second R. 12). Those motions were overruled by the court and exceptions saved. Then in the answer (second R. 15) the petitioner expressly stated that he did not waive his motion to dismiss. Then in the request for findings of fact and conclusions of law, the same question was duly preserved. The principles declared by the Supreme Court of Arkansas in *Unionaid*

Life Ins. Co. v. *Crutchfield,* and the other case therein cited, in our opinion, make it certain that the respondent could not change from a conversion suit to a suit for breach of contract.

There exists another reason precluding a change from a tort action to a contract action in this case. The Court of Appeals in the opinion, in discussing the question of whether or not Nakdimen breached the contract, after citing authorities, which are not in point here because of the waiver of the breach (second R. 46), states in substance that counsel have not called the court's attention to any Arkansas decisions or statutory provisions. In our brief in the Court of Appeals we called that court's attention to Section 2159 of Pope's Digest, which reads as follows:

> "An attempted transfer of title to a certificate or to shares represented thereby without delivery of the certificate shall have the effect of a promise to transfer, and the obligation, if any, imposed by such promise shall be determined by the law governing the formation and performance of contracts."

As we view it, that section gives Baker a right upon the contract to sue for the amount due on the contract when the note becomes due. The statute of frauds does not apply, because the Arkansas court has held that part performance takes the case out of the statute of frauds. *Minich* v. *Bass,* 183 Ark. 350.

The bringing of the conversion suit precluded petitioner from requesting an extension of the note, as the conversion suit was not disposed of until after the three years had expired. Besides, Baker did not give the sixty days' notice, required by the contract, of the maturity. See defendant's answer (second R. 17).

III.

The Court of Appeals erred in directing and permitting the respondent to occupy conflicting positions in this litigation.

Since the suggestion of the Court of Appeals as to amending the complaint so as to attempt to state a cause of action for damages for breach of contract was *obiter*, that suggestion was not binding upon that court or any other court. Since the plaintiff could not himself take that course, the court cannot legally direct that he should. If that were permissible, then the court could make an election for a litigant.

In the case of *Cleveland* v. *Biggers*, 163 Ark. 277, it was held by the Supreme Court of Arkansas:

> "However the right of election of remedies rests with the plaintiffs and not with us, and we cannot make the election for them."

IV.

The Court of Appeals erred in holding that the petitioner, I. H. Nakdimen, breached the contract on December 7, 1935.

There are two controlling reasons which prove that there was no breach of the contract by Nakdimen on December 7, 1935. The first reason is that the language of Nakdimen as given by Baker is wholly insufficient, under the law of Arkansas, to amount to an absolute refusal to perform the contract (first R. 44, 45, 46, 47 and 51). The second reason is conclusive. On the point that the language of Nakdimen is insufficient to show an absolute refusal, reference is made to the following cases:

Majestic Milling Co. v. *Copeland*, 93 Ark. 195.
Spencer Medicine Co. v. *Hall*, 78 Ark. 336.
Truemper v. *Thane Lumber Co.*, 154 Ark. 524.

The Supreme Court of Arkansas adopts the language of the Supreme Court of Minnesota in the case of *Armstrong* v. *St. P. & P. Coal & Iron Co.*, 48 Minn. 113.

In the *Majestic Milling Company* case, *supra*, the Supreme Court of Arkansas said:

> "But the rule is well established that in order for one party to a contract to be justified in treating it as broken by the other and claiming damages for the breach, there must have been a distinct and unequivocal intention manifested either by the words or conduct of the other not to perform the contract."

In the case of *Goldwyn Distributing Corp.* v. *Breneman* (3 CCA), 13 Fed. (2d) 105, the Court of Appeals held plainly and squarely that a temporary postponement to settle another controversy was not a breach of the contract, using this language:

> "Nothing short of a positive and unequivocal refusal to perform a contract will excuse the other party from tendering performance, and a mere request to suspend performance until an existing controversy is settled is not sufficient."

The court cited the following cases from this court:

United States v. *Smoots*, 82 U. S. 36.
Dingley v. *Oler*, 117 U. S. 490.

The second reason, which shows absolutely that there was no breach of the contract on December 7, 1935, is that Baker waived the delivery on that day and consented to and acquiesced in, for a valuable consideration, the

delay. Any provision in a contract may be waived by the parties thereto.

Empire Gas & Fuel Co. v. *Stern* (8 CCA), 15 Fed. (2d) 323.
Globe Mutual Life Ins. Co. v. *Wolff*, 95 U. S. 326.

A breach of contract is waived if either party acts on the theory that the contract is still in force.

In re Hook, 25 Fed. (2d) 498.

If Nakdimen breached the contract, Baker had an election either to accept the breach or to treat the contract as still valid.

In re Malco Milling & R. Co., 32 Fed. (2d) 825.
Gregg v. *England Loan Co.*, 171 Ark. 930.
First National Bank v. *Tate*, 178 Ark. 1098.
Wolf v. *Alexander Film Co.*, 186 Ark. 838.
Hodges v. *Taft*, 194 Ark. 259.

In the case last cited the Arkansas court said (263):

> "Anyone for whose benefit a provision in a contract is made may waive it, and it is therefore optional whether he will enforce it."

That language applies to Baker clearly, since the time of delivery of the note was for the benefit of Baker.

At no time, beginning December 7, 1935, down to and including February 9, 1936, did Baker give to Nakdimen the slightest hint that if Nakdimen did not perform, the contract would be treated as breached.

In the case of *Malmquist* v. *Peterson*, 149 Minn. 223, 183 N. W. 138, the court said:

> "This court has held that if after default in performance of a contract within the time stipulated the party entitled to take advantage of the default, with knowledge of the facts, treats the contract as still in force, or deals with the other party in a manner consistent only with a purpose on his part to regard the contract as still subsisting and not terminated by the default, he waives the default. In such event, strict performance according to the terms of the contract having been waived, a reasonable time and opportunity should be allowed to the vendee in which to make payment."

On the point that Baker's waiver prevented there being a breach by Nakdimen on December 7, we refer to the case of *McCormick* v. *F. & C. Co.*, 307 Pa. 434, 161 Atl. 532. In that case the Pennsylvania court said:

> "Many authorities hold, and so far as we are aware there are none to the contrary, that whenever the unequivocal act of one of the parties evidences an intent not to fulfill his executory agreement at the time specified in it, the other party may, if he does so promptly and unequivocally, accept such breach and sue at once; but until he does accept it, the act operates as a tender only. If he does not promptly and equivocally accept the tender, the contract remains in full force and effect according to its terms for the benefit of both parties to it."

The Pennsylvania court cites as an authority on the proposition the case of *Roehm* v. *Horst*, 178 U. S. 1.

In the case of *Atlantic Bitulithic Co.* v. *Town of Edgewood*, 103 W. Va. 137, 137 S. E. 223, the court said:

> "There is no breach so long as the injured party elects to treat the contract as continuing."

When Baker acquiesced in the delay and consented thereto, and received his salary until February 21, 1936, as a matter of law he waived any previous breach. His conduct and his language up to February 9, 1936, was upon the theory that the contract was still in existence. The laws of Arkansas, therefore, will not permit him to take a different position on February 9, 1936, or thereafter. The following cases, it is respectfully submitted, are conclusive upon Baker being estopped to claim a breach on December 7, 1935, or at any other time:

Majestic Milling Co. v. *Copeland*, 93 Ark. 195.
A. F. Shapleigh Hardware Co. v. *Hamilton*, 70 Ark. 313.
Grist v. *Lee*, 124 Ark. 206.
Belding v. *Whittington*, 154 Ark. 561.
Gregg v. *England Loan Co.*, 171 Ark. 930.
Cox v. *Harris*, 64 Ark. 213.
Bush v. *Barksdale*, 122 Ark. 262.
Cleveland v. *Biggers*, 163 Ark. 377.

If a party continues to treat a contract as a subsisting obligation, he waives any breach thereof.

Nelson v. *Chicago M. & L. Co.*, 76 Fed. (2d) 17.
Majestic Milling Co. v. *Copeland*, 93 Ark. 195.

In the case last cited, in addition to what has been quoted therefrom, the court said:

> "There was some delay in making shipments, but plaintiff consented to it, and the last request for shipment was promptly complied with. He waived the delay by consenting to it."

In *Tidwell* v. *Southern Engine & Boiler Works*, 87 Ark. 52, the Arkansas court held in substance that a party to a contract who urges its performance and completion waives thereby any breach by delay.

V.

The Court of Appeals erred in not holding that Baker, by his own evidence, and by the benefit which he derived from drawing his salary until February 21, 1936, waived delivery on December 7, 1935.

The following cases, in addition to those above cited on the preceding point, seem to be in point:

In re Hook, 25 Fed. (2d) 498.
Gregg v. *England Loan Co.*, 171 Ark. 930.
Roswell v. *Drainage Dist.*, 292 Fed. 29.
Miami Ry. & Mfg. Co. v. *Robinson*, 245 Fed. 596.

A waiver once made cannot be recalled.

First Federal Tr. Co. v. *First National Bank*, 297 Fed. 353.
Champion Spark Plug Co. v. *Auto M. Sand Co.*, 273 Fed. 74.

VI.

The Court of Appeals erred in refusing to hold that Baker, when on February 3, 1936, he demanded performance by Nakdimen, thereby waived any previous breach by Nakdimen, if there was one, and by such demand kept the contract alive for both parties.

It seems to be well settled everywhere that a party cannot occupy inconsistent positions. Any positive act indicating an intent to treat the contract as still existing keeps the contract alive for both parties. Baker never said a word nor did an act which indicated that he intended to treat the contract other than as valid until after or on February 9, 1936. He recognized its existence, even when he violated said contract by demanding unnamed attorney's fees and traveling expenses. His every act

up to that time indicated that he treated the contract as alive. He cannot, therefore, take the position now that the contract was not alive. The following Arkansas cases are squarely in point and hold that no person will be permitted either in litigation or otherwise to take inconsistent positions:

Belding v. *Whittington*, 154 Ark. 561.
Bush v. *Barksdale*, 122 Ark. 262.
H. G. Vogel Co. v. *Original Cap. Corp.*, 252 Mich. 129.
Harrison v. *Fulk*, 128 Ark. 229.

VII.

The Court of Appeals erred in not decreeing specific performance in favor of Nakdimen against Baker.

Under the law of Arkansas, a court of law has no jurisdiction to enforce specific performance.

Hamilton v. *Fowlkes*, 16 Ark. 340.
Greenfield v. *Carlton*, 30 Ark. 547.
Dollar v. *Knight*, 145 Ark. 522.
Harper v. *Thurlow*, 168 Ark. 491.

If this lawsuit, by reason of its being started before the effective date of the new federal rules, was under the old rules, then the equitable rights of Nakdimen are fully protected by the decisions of this court.

Erie Railroad Co. v. *Tompkins*, 304 U. S. 64.
Wichita Royalty Co. v. *City National Bank*, 306 U. S. 103.

If the new rules do apply to this case, then it should be decided upon equitable principles. The petitioner by his allegations in his answer brought himself well within

the rule of equity on the subject of specific performance, and the facts therein stated entitle him to such performance.

Grady v. *Gatlin*, 182 Ark. 184.

The answer of the defendant to the second amended complaint stated the facts which entitled the defendant to a decree of specific performance. Under the rule of law in Arkansas, as is shown by the cases cited under paragraph IV, when a party to a contract, by conduct and otherwise, waives a breach by the other party and treats the contract as existing, and thereafter breaches the contract himself, as did Baker when he refused to accept the note and documents, he may be compelled specifically to perform.

But the Court of Appeals erroneously says Nakdimen breached the contract first and hence cannot have specific performance.

It is submitted that the Supreme Court of Arkansas has settled that question in a number of cases. In the case of *Friar* v. *Baldridge*, 91 Ark. 133, a case cited by the Court of Appeals in its last opinion, the Supreme Court of Arkansas used this language:

> "The following equitable principle formulated by Mr. Pomeroy has been repeatedly approved by this court: 'If there has been a breach of the agreement sufficient to cause a forfeiture, and the party entitled thereto either expressly or by his conduct waives it or acquiesces in it, he will be precluded from enforcing the forfeiture, and equity will aid the defaulting party by relieving against it, if necessary.' "

See *Little Rock Granite Co.* v. *Shell*, 59 Ark. 405.

The points above discussed will be emphasized by calling this court's attention to the errors in the opinion of the Court of Appeals. We are not requesting this court in this petition for certiorari to pass on questions of fact. As elsewhere stated, the errors of the Court of Appeals are based upon a failure to follow the decisions of the Supreme Court of Arkansas on questions of law. The said court (second R. 44), in discussing point 1 of the opinion, admits that it was impossible to determine from the contents of the second amended complaint whether the cause of action was on contract or tort. That admission of the court brings the case squarely within the rule in the A. F. Shapleigh case, and the case of Grist vs. Lee, cited above, and in our opinion requires the reversal of the case, and either its dismissal or the granting of the specific performance against the plaintiff. The other questions in that paragraph of the opinion have already been sufficiently discussed.

The court (second R. 44) then discusses the question of specific performance, and in doing so erroneously fails to follow the Supreme Court of Arkansas showing that there was no breach by Nakdimen on December 7, 1935. We have already sufficiently discussed the questions in that paragraph.

In paragraph 3 (second R. 45) the opinion states that "upon Nakdimen's refusal to deliver the note and pledge on December 7, 1935, Baker immediately acquired a cause of action for breach of contract." The court cites *Grist* v. *Lee, supra,* but that case does not support the court's opinion. Neither do the other Arkansas cases cited in that paragraph furnish any support for the court's conclusion. In the same paragraph (second R. 45) the court suggests that no valid reason existed for

Nakdimen's refusal to make an immediate delivery of the documents on February 3, 1936. The court entirely overlooks Baker's waiver and the salary which was paid him down to February 21, 1936, which was after the petitioner had offered to perform. The court in making that statement also overlooks the decisions from the Arkansas court to the effect that if one party waives a breach, the contract is kept alive for both parties.

The court cites two Arkansas cases (second R. 46) and it will be found upon examining those cases that neither of them supports the court's opinion. The Court of Appeals finds that a promissory note and a pledge of securities are clearly things of fluctuating value. We respectfully submit that whether such things are of fluctuating value depends upon evidence. There is not a particle of evidence in this record tending to show that the note was not of the value assumed, and nothing to show that it was of fluctuating value. Even if its value depended upon the value of the security, there is no evidence that it was fluctuating.

On the same page (second R. 46) the opinion states: "The authorities cited above indicate that Arkansas follows the generally accepted rule." We have not found a single case cited by the court, and none by search of the authorities, which tends to show that Arkansas follows the general rule referred to. For the reasons given heretofore, the rule is not applicable because Baker by his own admission waived the breach, as heretofore demonstrated.

In paragraph 4 (second R. 46) we find a surprising argument in the court's opinion to the effect that there was a "contention that Baker's refusal to accept the un-

conditional tender of performance on February 9, 1936, amounted to a waiver of Nakdimen's prior breach of the contract." The defendant never at any time made that contention. The court states that a short answer to that contention is that Nakdimen did not plead waiver. We urge that Nakdimen did plead waiver, and the court's error on that subject was noticed in our petition for rehearing (second R. 53). In the first place, the rule in Arkansas is that if evidence is admitted without objection, the pleadings will be treated as amended to conform to the proof.

St. L., A. & T. R. Co. v. *Triplett,* 54 Ark. 289.
McElhaney v. *Smith,* 76 Ark. 68.
Arkansas Bankers' Assn. v. *Ligon,* 174 Ark. 234.
RCA Victor Co. v. *Dougherty,* 191 Ark. 401.

In addition to that, estoppel was set up by the defendant, and waiver is but a species of estoppel.

Maloney v. *M. W. Masonic Assn.,* 40 N. Y. S. 918.
Knarison v. *Manhattan Life Ins. Co.,* 140 Cal. 57.
Kidder v. *Knights Templars Life Indemnity Co.,* 94 Wis. 538.
Schwab v. *Brotherhood of American Yeomen,* 305 Mo. 148.

In discussing said paragraph 4 (second R. 47) the opinion in effect holds that there was no consideration. The Supreme Court of Arkansas, in our opinion, settled that question against the court's view in the case of *First National Bank* v. *Tate,* 178 Ark. 1098. In that case the parties by agreement changed the terms of the old contract. In the instant case, Baker changed the time of delivery by consenting to the delay. The Arkansas court held that the agreement changing the provisions of the

old contract was a sufficient consideration by both parties. In addition to that, we respectfully urge that there was a consideration as heretofore pointed out.

In the same paragraph 4 the court in the opinion states that the matter of waiver cannot be raised for the first time in the Court of Appeals. That question was raised in the District Court by the request of defendant for findings of fact and declarations of law. See second R. page 28, and especially paragraph 6 thereof. The other requests, in our opinion, raise the same question.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers in order that the errors of the Court of Appeals be corrected and set aside, and that the contract may be sustained, and that to such an end a writ of certiorari should be granted and this court should review the decision of the Court of Appeals for the Eighth Circuit and finally reverse said decision.

JAMES B. MCDONOUGH,
G. O. PATTERSON,
EDWARD H. PATTERSON,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 172.

I. H. NAKDIMEN, ET AL., PETITIONERS,

VS.

LAZARE BAKER, RESPONDENT.

REPLY BRIEF OF PETITIONERS.

JAMES B. McDONOUGH,
GEORGE O. PATTERSON,
EDWARD H. PATTERSON,
Counsel for Petitioners.

INDEX.

Subject Index.

Table of Cases.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 172.

I. H. NAKDIMEN, ET AL., PETITIONERS,

VS.

LAZARE BAKER, RESPONDENT.

REPLY BRIEF OF PETITIONERS.

We concur in the statement of the Court of Appeals that the controlling facts are not in dispute. The Court of Appeals was led into error by an erroneous view of the law on the several points discussed below. The purpose of this reply brief is to call attention to some of the errors of the respondent in his opposing brief, and also, incidentally, to show the errors of the Court of Appeals as manifested in the last opinion. Candidly, we submit that the respondent in his opposing brief has failed to discuss the controlling questions.

I.

Respondent's erroneous statement of the nature of the case on the first appeal.

Under the title "The First Appeal," the respondent, by a statement unsupported in the record, attempts to

contend that the first amended complaint stated a cause of action called a breach of contract (Respondent's Brief, page 2). The respondent's first amended complaint was a suit in conversion—a plain and simple tort action. *His evidence failed to support his allegations.* Said complaint filed September 10, 1937 (First R-2), about ten months after his original complaint was filed, the latter being filed October 27th, 1936 (First R-64), and twenty-one months after the contract of purchase and sale was made. The said first amended complaint recites that leave of the court was had, but no court order is in the record to that effect. The respondent, in all the proceedings in the District Court and in the Court of Appeals, on the first appeal, vigorously asserted and contended that said suit was a *conversion* suit; but the Court of Appeals (100 Fed. (2) 195) held that it was not a conversion suit. The respondent seems now to contend in his opposing brief that his first amended complaint was not in conversion. But the result is the same even though he did not state a cause of action in conversion. The law prohibits his occupying inconsistent positions. The respondent's contentions and not the result of the suit precludes his maintaining the second suit. Even if the first suit is dismissed without prejudice, he is barred. An Arkansas case exactly in point is *Belding* v. *Whittington,* 154 Ark. 561. Substantially, the effect of the decision of said court on the first appeal is that no cause of action was stated. Said court, in said first appeal, said:

> "The appeal presents but one question necessary to its determination,"

and further said:

> "The case is clearly controlled by the decision of the Supreme Court of Arkansas in the case of *Grist* v. *Lee,* 124 Ark. 206."

That case, in its facts and principles, is identical with the case at bar, and we respectfully urge that that case does control the federal courts in the decision of this case, and on account of that case the Court of Appeals on the first appeal should have dismissed the case, or should have reversed the same with an order to the District Court to dismiss it. In our opinion, that case, and the decision therein, is alone sufficient to justify this court in granting a writ of certiorari, and in reversing this case.

Notwithstanding the respondent, throughout all the proceedings in this cause, as above shown, asserted and admitted that the first amended complaint was a plain suit in conversion, now for the first time in this litigation the respondent makes the following wholly unsupported statement in his brief as to the nature of the action described in said first amended complaint, to-wit (Brief, p. 2):

> "The first amended petition (Record in 11190, p. 2) in the first trial sought recovery for the failure and refusal of defendant to carry out an agreement of sale by plaintiff and purchase by defendant of shares of plaintiff in the City National Company, by failing and refusing to contemporaneously deliver his note, with the collateral sold in payment to plaintiff."

That statement plainly describes a cause of action for breach of contract. The first complaint was not for a breach of contract. It was for conversion. The laws of Arkansas do not permit the respondent to contend now for the first time that the first amended complaint stated a cause of action for breach of contract.

Cox v. *Harris,* 64 Ark. 213.
Belding v. *Whittington,* 154 Ark. 561.

Bush v. *Barksdale,* 122 Ark. 262.
A. F. Shapleigh Hdw. Co. v. *Hamilton,* 70 Ark. 313.
Grist v. *Lee,* 124 Ark. 206.
(See other case on page 31 of our brief.)

The only purpose which we can see the respondent could have in making that unsupported statement is to escape the application of the laws of Arkansas as set forth in the above cases to the effect that the respondent after failing in his conversion suit cannot maintain a suit for breach of contract.

II.

The suggestion of the Court of Appeals on the first appeal as to amending the complaint, and the other language of said court as to the effectiveness of the note is *obiter dictum*—and also as to a cause of action for breach of contract, is *obiter dictum.*

This conclusion is established by the language of the Court of Appeals on said first appeal. That court (100 Fed. (2) 196) said:

> "The appeal presents but one question necessary to its determination;" and
>
> "The case is clearly controlled by the decision of the Supreme Court of Arkansas in the case of *Grist* v. *Lee,* 124 Ark. 206."

This court, in the case of *Carroll* v. *Lessee of Carroll,* 16 How. 265, said:

> "And therefore this court, and other courts organized under the common law, has never held itself bound by any part of an opinion in any case which was not needful to the ascertainment of the right or title in question between the parties."

Without further discussion on that point, we refer to the following authorities:

O'Donoghue v. *U. S.*, 289 U. S. 516.
Connor v. *Blackwood*, 176 Ark. 139.
Scruggs v. *State*, 131 Ark. 320.
Payne v. *State*, 124 Ark. 20.
U. S. v. *Waite* (8th Cir.), 33 Fed. (2) 567.

III.

Respondent claims in his brief (pages 4, 25) that petitioner asserted in the first appeal that the suit was on contract and not conversion.

Even if the petitioner had so contended in his brief before the Court of Appeals in the first appeal, that contention was not in conflict with the contention of petitioner now. A statement that the suit was upon contract and not in tort, is not a statement that it is a suit for breach of contract. The petitioner moved the court (First R-5) to dismiss the first amended complaint because the same did not state a cause of action. That contention did not mean that the first amended complaint stated a cause of action for breach of contract. There was no such issue in that case then. The issue was conversion or no conversion. Under the authorities on the subject a suit on a contract means a recovery based on the contract, and not a recovery for a breach of the contract. But the Court of Appeals, on the second appeal, destroyed the complaint as a pleading. That court (111 Fed. (2) 778) said:

> "Plaintiff's original petition (referring to the first amended complaint) was so drawn that it was impossible to determine whether the cause of action was based on the contract, or tort, or both."

A complaint that is so drawn as to make it "impossible" for a court to say what the nature of the cause

of action is, certainly violates the new federal rules and all other sound rules of pleading, and wholly fails to state any cause of action at all.

The Court of Appeals for the Eighth Circuit in suggesting an amendment to a complaint, which it was impossible for the court to understand, and in refusing to dismiss the second amended complaint (Second R. 11, 12), plainly refused to follow the law of Arkansas as settled and determined by the Supreme Court of that state in 1886 and as reaffirmed in 1902 in the case of *A. F. Shapleigh Hardware Co.* v. *Hamilton,* 70 Ark. 319, wherein the said Arkansas court, discussing the exact question, said:

> "It is settled, by an almost unanimous series of decisions in various states, that if a complaint or petition in terms alleges a cause of action *ex delicto,* for fraud, conversion, or any other kind of tort, and the proof establishes a breach of contract, express or implied, no recovery can be had, and the action must be dismissed, even though by disregarding the averments of tort, and treating them as surplusage, there might be left remaining the necessary and sufficient allegations, if they stood alone, to show a liability upon the contract."

And the Arkansas court added this:

> "A party cannot sue in tort and recover in contract or assumpsit."

The respondent in his brief cites cases on various points from Illinois, Connecticut, and other states. The law of Arkansas, and not the laws of other states, governs.

In the case of *Grist* v. *Lee,* 124 Ark. 206, which, as we have stated, is identical in facts and principles with the present case, the Supreme Court of Arkansas reversed and dismissed the case with this language:

> "We think, therefore, that error was committed in thus permitting appellee to change the nature of his cause of action, and the judgment must, therefore, be reversed, and the cause will be dismissed."

The Supreme Court of Arkansas in *Unionaid Life Ins. Co.* v. *Crutchfield,* 182 Ark. 825, said:

> "A cause of action for breach of a contract and one for fraud in procuring such contract cannot be joined, the one being *ex contractu* and the other *ex delicto.*"

In the cases heretofore cited from the Supreme Court of Arkansas it is clear that where a complaint is so drawn that it is impossible to tell its nature, said complaint should be dismissed, and it cannot be changed by any court from a tort action to a contract action. Contract actions, as before suggested, are of two kinds. One is for the breach of a contract and the other is to recover money that the defendant is obligated to pay. It is our contention in this case that neither the first complaint nor the first amended complaint, nor the second amended complaint, stated any *present* cause of action. The very language used in the second amended complaint, and the language used by the District Court in his findings of fact and conclusions of law, is not language to be found in an action to recover damages for a breach of the contract. The breach action cannot, therefore, be maintained for the reason, as elsewhere stated, that the note is valid and in existence and there has been a constructive delivery, and since the note will not now be due until December 7, 1940, no suit can be maintained until after that date.

IV.

Under the laws of Arkansas there was a constructive delivery of the note and the certificate, and therefore, there can be no recovery for a failure to deliver said documents.

In our brief before the Court of Appeals in the second appeal we cited the cases here cited on the point that there was a constructive delivery of the note and the certificate. We also contend that Section 2159 of Pope's Digest, which is quoted in our brief on petition for certiorari, authorizes a suit by the respondent against the petitioner on the note and the certificate *but not until after the note becomes due.* The respondent, by his bringing of the conversion suit, which was not disposed of by the Court of Appeals on the first appeal until after the expiration of the three years, and by his failure to give the notice of the maturity as provided in the note, precluded the petitioner from giving a notice of extension. That question is dwelt with in our answer in this case.

The case of *Johnson* v. *Johnson,* 188 Ark. 992, seems to us in point and controlling on the question of delivery of the documents. In that case, it appears from the report that J. R. Johnson sold to W. S. Johnson $4,000 worth of the capital stock of the Johnson Orchard Co. W. S. Johnson gave to J. R. Johnson three promissory notes in payment thereof. On the question of delivery the court said:

> "The fact that the stock was retained by J. R. Johnson and never delivered to the appellant is immaterial. The contract is that the stock was to be held by J. R. Johnson only as collateral security for the payment of the notes evidencing its purchase price. As between the parties, delivery was not necessary to vest title in the buyer and title to the

stock passed, although it was not delivered to the appellant but remained in the possession of the seller."

On that the Arkansas court cited several cases. In addition, we refer this court to the following cases showing that the circumstances surrounding this deal and the conduct of the parties establish a constructive delivery on December 7th, 1935.

Lynch v. *Dagget*, 62 Ark. 592.
Field v. *Simco*, 7 Ark. 269.
Kate La Nieve Co. v. *Plant*, 172 Ark. 82.
Vance v. *Bell*, 153 Ark. 229.

If we are right in our contention as to the constructive delivery, *it is impossible for the respondent to recover for a breach of contract.* The breach alleged is the failure to deliver the note and other documents. Since the Arkansas law proves that there was a constructive delivery, necessarily there can be no recovery for a failure to deliver. No wrong is done to the respondent by such a view of the law and the facts. The respondent knew (First R-23) that I. H. Nakdimen could buy his stock provided he was willing to give time. He had his attorney come to Ft. Smith to assist in the sale. He therefore knew that the money would not be due either until December 7th, 1938, or December 7th, 1940.

V.

The court has no power to elect for a litigant.

That principle was decided by the Supreme Court of Arkansas in the case of *Cleveland* v. *Biggers*, 163 Ark. 277.

VI.

There never was any unqualified refusal by I. H. Nakdimen.

It is the well established rule in Arkansas that before one party to a contract can treat the contract as breached *there must be an unqualified refusal.* (*Majestic Milling Co.* v. *Copeland,* 93 Ark. 195.)

VII.

If there was a breach, and we say there was none, it was waived by Baker.

It is undisputed, and such is the evidence of Baker, that when he went to the bank on the morning of December 7th, 1935, he asked for the note and other documents. According to Baker's evidence, from that day until February 3rd, 1936, *he never again mentioned the subject to I. H. Nakdimen.* His evidence also shows, which we have set up in our statement of the case, that he acquiesced in the delay brought about by Nakdimen's request, and consented thereto. Instead of resigning on December 7th, 1935, he held his office as secretary-treasurer until February 21st, 1936, *and drew his salary up to the latter date.* The salary which he drew between December 7th, 1935, and February 21st, 1936, was not deducted from the purchase price of the stock (First R-51). He assented to the delay *and he received his salary for sixty days by reason of his assent to that delay.*

VIII.

Baker treated the contract as in full force and existence on December 7, 1935, and also on February 3rd, 1936.

It is well settled that when one party treats a contract as valid, the contract remains in existence for the

benefit of both parties. (See the cases cited by us beginning on page 27 of our brief in support of our petition.)

IX.

The respondent never gave the petitioner any notice that the respondent would treat the contract as breached by the petitioner.

The law is well settled that before the party who claims a breach can treat the contract as breached, he must give notice to the other party that his conduct will be treated as a breach and the other party has a reasonable time in which to perform.

> See our brief, paragraph IV, and especially page 29 and following.

On February 3rd, the respondent demanded performance from Nakdimen but did not say he would treat the contract as breached *and did not limit the time within which Nakdimen was to perform.* In respondent's brief mention is made of a *contemporaneous* delivery of the note and other documents. There was no agreement of that kind, but it is not necessary to dwell on that question as the other questions, in our opinion, give the petitioner the right to the writ and to a reversal. If there was such an agreement the delivery on December 7, 1935, was waived.

X.

Specific Performance.

Under the decisions of the Supreme Court of Arkansas herein cited, the respondent as a matter of law, as is shown by his own evidence, waived the delivery of the note and documents on December 7, 1935, and remained

as secretary-treasurer *and drew his salary up to February 21, 1936.* By his own testimony it is shown that after his acquiescing in the delay suggested by Nakdimen, and after his consenting to said delay and receiving a consideration therefor in his salary, *he never again mentioned the delivery of the note and other documents until February 3, 1936.* Baker's silence covering the period up to February 3, 1936, establishes his consent to the postponement. Under the decisions of the Arkansas court elsewhere cited, when Baker again demanded performance and offered performance on February 3, 1936, he again thereby elected to treat the contract as in full force and effect. Since Baker did not notify Nakdimen that he (Baker) would treat the contract as abandoned or breached by Nakdimen unless the latter performed within a certain time, said contract was therefore in full force and effect up to and including February 9, 1936. Under the law, Nakdimen had a reasonable time after February 3, 1936, in which to offer full and complete performance. Therefore, when Baker *as a condition of accepting the note and other documents demanded traveling expenses, which he later admitted he did not intend to charge, and also demanded attorney's fees, which under the law he was not entitled to, he necessarily breached the contract on February 9, 1936, by refusing to perform.*

This argument is further supported by the doctrine of constructive delivery elsewhere discussed. Baker therefore breached the contract himself; and since a court of law had no jurisdiction to enforce specific performance, Nakdimen was entitled to have the cause transferred to the equity docket unless, under the federal rules, equity principles could be preserved to Nakdimen under Arkansas law. We have cited the controlling cases on that subject on pages 33 and 34 of our brief in support of our petition.

XI.

Additional reason requiring the Court of Appeals on the first appeal and on the second appeal to dismiss the cause.

On page 86 of the first record it is shown that the District Court instructed the jury that if they found for the plaintiff they would find the amount of the note and certain interest; and also the court said: "On the other hand, if you find for the defendant, the result is that the note and the obligations in the case, the stock—*I mean the note obligation and the stock, having been tendered into court here, will be for the plaintiff to accept.*" And on the same subject the court added: "*If you find for the defendant, then they (plaintiff) follow the terms of the contract and agreement and accept the note of $13,125.00.*"

The jury, because of the errors of the District Court, found there was a conversion. The Court of Appeals on the first appeal found as a matter of law that there was no conversion. The respondent concurred in and adopted those instructions of the court. Therefore, the respondent in substance and effect asserted and contended that if there was no conversion, *the respondent was the owner of the note and other documents.* Therefore, under the decisions of the Arkansas court, the respondent cannot now claim that there was no delivery of the note and other documents to him.

XII.

Errors of the Court of Appeals and respondent as to the effect of Nakdimen's offer to perform on February 9, 1936.

The Court of Appeals says that a short answer to that contention would be that the question was not

raised. Under Rule 15 of the new federal rules, it is our understanding that the pleadings will be treated as amended to conform to the proof where no objection is offered to the introduction of the evidence. Since the evidence was the plaintiff's own testimony, there was no objection. But, in addition, the question was raised by setting up estoppel and waiver in the answer and in the trial. The court's attention is directed to that in our petition for certiorari.

We have found nothing in the rules that can be held to reverse the decisions of this court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, and the other cases by this court on the same subject. We find that under the new rules that a request for findings is not necessary to preserve the question in the review authorized by a Court of Appeals, but our request was made in the District Court as is shown by our petition.

XIII.

United States Auto Co. vs. DeShong, 134 Ark. 392.

The respondent relies upon this case, intimating that said case modifies the decision of the Supreme Court of Arkansas in Grist vs. Lee. That contention is clearly erroneous. In this DeShong case, the Supreme Court of Arkansas expressly reaffirms the doctrine of Grist vs. Lee. In addition, the DeShong case was a suit in tort, and a demand of a judgment for the money resulting from the sale of the automobile was also in tort. *Hence there was no change from a tort to contract, or contract to tort.* The Supreme Court of Arkansas said: *"Here there is no change in the cause of action."* It is therefore observed that the DeShong case affirms the doctrine of Grist vs. Lee.

XIV.

Errors of the Court of Appeals and respondent as to payment of the stock with a note.

The Court of Appeals and the respondent entirely overlook the undisputed evidence of Baker, in effect, that he assented to the postponement or delay in the delivery, and that he never again discussed the subject until February 3, 1936, and that by reason of his evidence there was no breach of the contract on December 7, 1935, and hence the doctrine as to payment in chattels has no application.

It is respectfully submitted that under the Arkansas law, and under the decisions of this court in the case of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, and *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 302, and the other cases elsewhere cited, the petition for certiorari should be granted and the cause should be reversed.

James B. McDonough,
George O. Patterson,
Edward H. Patterson,
Counsel for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

ISER H. NAKDIMEN et al.,
Petitioners,

vs.

LAZARE BAKER,
Respondent.

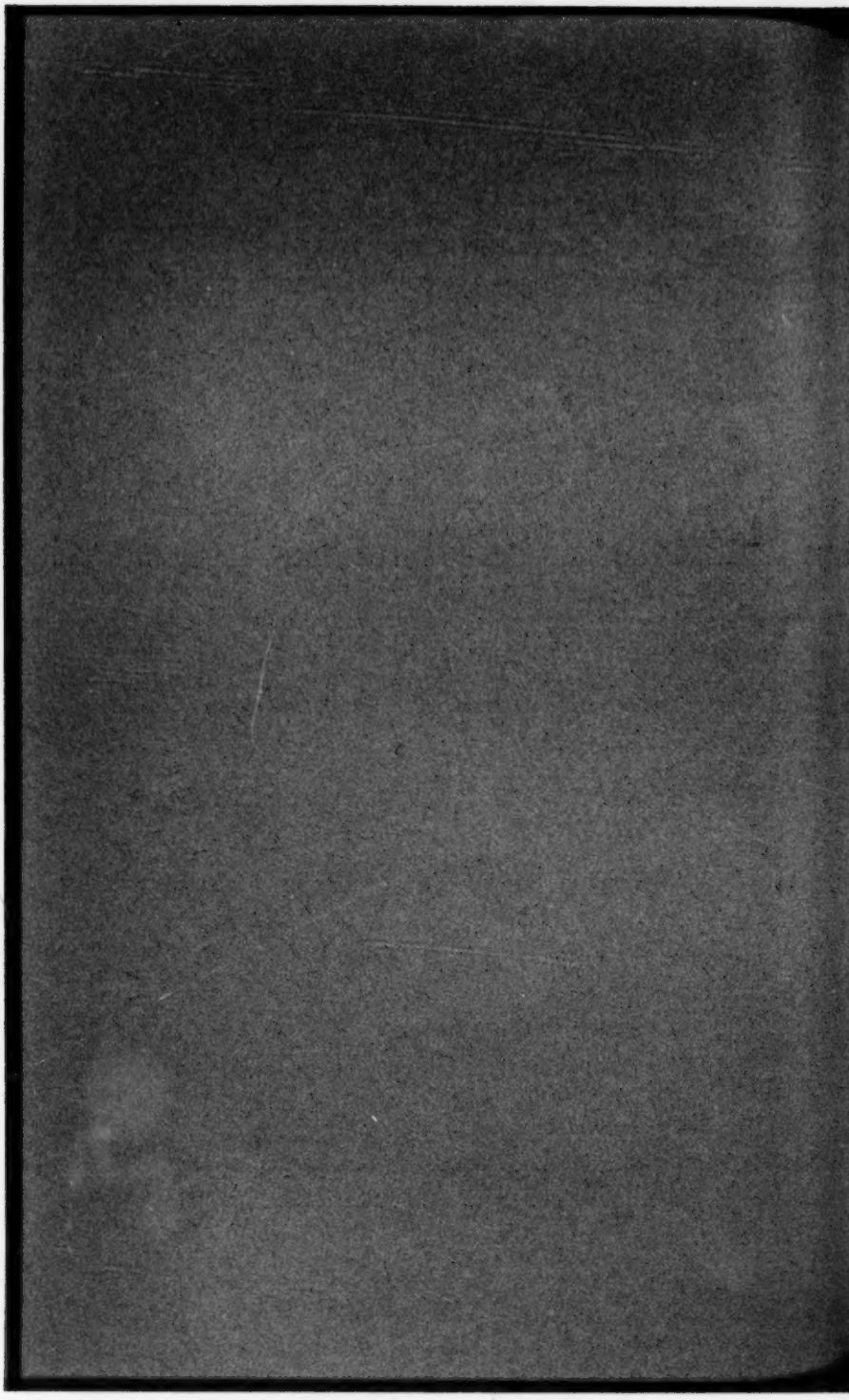
No. 172.

OPPOSING BRIEF OF RESPONDENT ON PETITION FOR CERTIORARI.

HAROLD R. SMALL,
Attorney for Respondent.

PRYOR & PRYOR,
CARTER & SMALL,
THOMAS B. PRYOR,
EMMET T. CARTER,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.



INDEX.

Cases Cited.

Textbooks Cited.

Statute Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

ISER H. NAKDIMEN et al., Petitioners,

vs.

LAZARE BAKER, Respondent.

No. 172.

OPPOSING BRIEF OF RESPONDENT ON PETITION FOR CERTIORARI.

STATEMENT.

This suit begun October 27, 1936, in the District Court of the United States for the Western District of Arkansas, was first tried before Honorable Heartsill Ragan, District Judge, and a jury, and there was a verdict and judgment for plaintiff for $13,125.00, with certain interest on January 28, 1938.

On the first appeal the United States Circuit Court of Appeals on December 12, 1938, reversed and remanded the case, with instructions to grant a new trial and to permit the parties to amend their pleadings, if they should so elect, or to require them to do so if the Court should so direct (R. 8). Nakdimen v. Baker, 100 Fed. (2d) 195.

The second amended petition of plaintiff was filed in the District Court February 4, 1939. The answer of defendant was filed May 29, 1939 (R. 15). The case was tried before Judge Lemley, without a jury, September 26, 1939, by agreement of the parties upon transcript of the evidence at the former trial (No. 11,190 in the United States Circuit Court of Appeals), and resulted in judgment on September 26, 1939, for plaintiff for $13,125.00, with interest at 6 per cent per annum *from the date of the judgment only* (R. 20).

Requested findings of fact of plaintiff (R. 21) were granted that day (R. 25), as were plaintiff's requests for conclusions of law (R. 25-27). Defendant's requested findings of fact 1 and 2 expressing the agreement of sale were granted, and requests of defendant Nos. 3 to 12 were refused (R. 27). Defendant's requested conclusions of law (R. 29-30) were refused.

Defendant appealed and the Court of Appeals affirmed the judgment.

A writ of certiorari is now sought from this Court to the Court of Appeals.

THE FIRST APPEAL.

Proceedings in the first trial and on the first appeal are referred to because of contentions now made by defendant petitioners.

The first amended petition (Record in 11,190, page 2) in the first trial sought recovery for the failure and refusal of defendant to carry out an agreement of sale by plaintiff and purchase by defendant of shares of plaintiff in the City National Company by failing and refusing to contemporaneously deliver his note with the collateral sold in payment to plaintiff. The agreement of sale was by answer, in effect, admitted (11,190, page 8).

Judge Ragan's instruction to the jury in the former trial, with respect to the agreement, was stated to be as follows (Record in No. 11,190, pages 82, 83) and the Court of Appeals in its decision on the first and second appeals found the same to be the agreement (Nakdimen v. Baker, 100 Fed. [2d] 195, 196, and opinion on the second appeal, Record 11,690, page 41):

> "Under the pleadings and the evidence it appears an agreement was entered into at Fort Smith, Arkansas, December 6, 1935, between the plaintiff, Baker, and the defendant, Iser Nakdimen. By this agreement Baker was to transfer his 200 shares of stock, each of the par value of $100.00, in the City National Company into a certificate for the same number of shares in favor of defendant, Iser Nakdimen's wife, Celia Nakdimen, and in consideration of this transfer Iser Nakdimen was to execute and deliver his three-year noninterest note for $13,125.00 with an option to renew for another two years, the terms of which note were fully agreed on; if the note was renewed the amount of the renewal was to be $13,700.00. The three-year note obligation was to be secured by the certificate in the name of Iser Nakdimen's wife and was to be endorsed by her before being pledged to secure the note. Pursuant to this agreement the three-year note was signed by defendant, Iser Nakdimen, the certificate of stock in favor of plaintiff, Baker, was surrendered and transferred into a certificate in favor of Celia Nakdimen and by plaintiff delivered to defendant, Iser Nakdimen, for endorsement by Celia Nakdimen, and a written consent was agreed on and delivered to Iser Nakdimen December 6, 1935; the certificate in favor of Celia Nakdimen was endorsed by her that evening along with the written consent that her certificate so endorsed might be used as a pledge to secure the payment of Iser Nakdimen's note for $13,125.00. The understanding was during the day of December 6, 1935, that the

signatures would be obtained that evening and that the signed note, the Celia Nakdimen certificate endorsed and the consent of Celia Nakdimen signed would be delivered to plaintiff, Baker, the next day. Now, both parties agree that these are the terms of the contract. There is no dispute about that."

Judge Ragan instructed further on the theory of conversion (Record in 11,190, page 84). The jury found for plaintiff for the note amount, $13,125.00, with certain interest (11,199, page 17).

Defendant appealed and in defendant's brief in 11,190 contended:

> "AS A MATTER OF LAW, THIS SUIT IS UPON A CONTRACT AND NOT UPON A TORT, AND THEREFORE THE LOWER COURT COMMITTED ERROR IN THE HOLDING THAT THE ACTION WAS IN TORT" (Brief Index, page I; Brief, page 12, and page 20 in 11,190).

The Court (Nakdimen v. Baker, 100 Fed. [2d] 195 [Record 11,612, p. 8]), reversed the case on December 12, 1938, and instructed that amended pleadings be filed.

In September, 1938, the new federal rules governing pleading and civil procedure in the district courts had become effective.

PROCEEDINGS AFTER REVERSAL AND REMANDING.

Second Amended Complaint.

On February 4, 1939, plaintiff filed his second amended petition pursuant to the order of the Court of Appeals, which set forth the above agreement as to which there appears to be no question, and alleged the complete performance of the agreement on the part of the plaintiff by trans-

fer of the shares by plaintiff to defendant's wife, alleged the breach of the agreement on the part of the defendant Nakdimen in his failure and refusal to deliver, as agreed, on December 7, 1935, or thereafter, his note for $13,125.00, the signed consent and the endorsed certificate of stock, and prayed recovery of $13,125.00 (Record 11,612, p. 8).

Motion of Defendant.

On February 14, 1939, defendant filed a motion, stating:

> "Said complaint does not allege and show whether said suit is now upon contract or upon tort.
>
> "Under the first amended complaint, the Court held that the suit was upon tort, being for conversion. The Court of Appeals in its opinion, held that this court should have sustained the defendant's motion to require the plaintiff to elect, whether he is suing upon tort or upon contract. This second amended complaint is indefinite and uncertain, and does not show that it complies with the opinion of the Court of Appeals and hence the cause should be dismissed.
>
> "The Court of Appeals held that the suit could not be maintained upon conversion, and reversed the case. *If the present action is one for breach of contract, it is an attempt to change from a tort action to a contract action, and, under the decisions of the Arkansas courts, that cannot be done, and, therefore, this cause must be dismissed because it cannot be maintained upon conversion, and it cannot be changed from conversion to contract.* The said complaint does not state facts sufficient to constitute a cause of action against this defendant" (R. in 11,612, 11).

On April 24, 1939, this motion was overruled.

Answer of Defendant.

The answer of defendant to the second amended complaint was filed May 29, 1939 (R. in 11,612, 15). Defendant,

without waiving his motion to dismiss the cause, alleged as defenses *that the Court had no power or jurisdiction to change the position of the plaintiff from an alleged suit in conversion to a suit on contract;* that defendant and plaintiff on December 6, 1935, entered into a contract for the purchase and sale of 200 shares of stock of the City National Company, and alleged that such contract is a valid, binding obligation, and the defendant is ready and willing to perform said contract fully and completely, *and has been ready and willing to perform said contract from and after December 7, 1935; that defendant tendered the note and other documents on December 7, 1935,* and on refusal of plaintiff to accept the same, defendant has held the same and has not exercised any power or dominion over said note and other documents; *that the time of delivery of said note and other documents was not material "and although he tendered said documents December 7, 1935, and was ready and willing thereafter to deliver said documents, it was not a breach of said contract if said documents were not delivered on December 7, 1935, as said documents were held at all times as the property of the plaintiff." Defendant denied he failed on December 7, 1935, on demand of plaintiff, to deliver;* alleges the contract of purchase and sale was completely performed, except plaintiff refused to receive and accept said note and other documents when tendered to him, as required by the contract.

"The plaintiff alleges in his complaint that the defendant held possession of said note and said documents, *but does not allege that said note and said documents were wrongfully withheld from the plaintiff, and does not allege that they were withheld from the plaintiff in violation of the terms of said contract."*

Defendant further alleged plaintiff's second amended complaint is indefinite, because not stating "whether it is a suit to recover damages for breach of this contract, and

this defendant denies that he has in any manner breached said contract"; that defendant in his former answer to the first amended complaint, offered to perform fully and completely said contract, and prayed in his answer that plaintiff "be compelled specifically to perform said contract," and such offers of the defendant were in law and in effect, an election to exercise the option contained in the note in controversy if an option was required; that plaintiff was required by the terms of the note to give defendant sixty days' notice of the maturity of the note; that plaintiff has not given any such notice; that the defendant by his answer elects to extend the time of payment of said note; that plaintiff *by bringing "the inconsistent suit for conversion, took a position which prevented the defendant from exercising a formal option other than as herein set forth"*; that by the terms of the note it was due December 6, 1938; that the Court of Appeals did not decide the case until December 12, 1938; that the Court of Appeals did not decide defendant's motion for rehearing until January 12, 1939; that it was not possible for defendant to exercise the option by offering to perform fully and completely the contract; that the mandate of the Court of Appeals was issued January 24, 1939; that plaintiff did not file his second amended petition until February 4, 1939, and that *the "inconsistent position of the plaintiff in bringing a suit in tort prevented any earlier election of the option, except as above shown, and plaintiff is now estopped from and amending his complaint as now done"*; that defendant is ready to perform the contract in full, and offers so to do, and states that ownership of the note carries with it control of the corporate affairs of the corporation; that there is none of the stock on the market, and defendant cannot purchase and acquire such stock; that under the laws of Arkansas, defendant is entitled to specific performance of said contract of purchase and sale; that defendant cannot acquire on

the market shares to effect control; that the note and other documents are made a part of the answer; that the cause should be transferred to equity, tried and a decree rendered "compelling the plaintiff specifically to perform said contract, and that the due date of said note, upon the facts herein alleged, should be declared to be December 6, 1940, and defendant is ready and willing to carry out all the terms of said contract as provided in said note, and pay the same on its due date, as herein alleged, and said note and documents are now in the registry of this court and are hereby tendered to plaintiff." Defendant then prayed that defendant have all other and further relief to which he may be entitled, *in equity and in law*, and that defendant's second amended complaint be dismissed, and that plaintiff be compelled specifically to perform said contract.

TRIAL.

The case was tried the second time without a jury on the record on the first appeal as shown by the stipulation of the parties (R. in 11612, 20, 35). Judge Lemley made findings of fact at the request of the plaintiff (R. 21-25), which found in effect the agreement to be the agreement as found by Judge Ragan in the first trial, and by the United States Court of Appeals on the first appeal (R. 21-22) (Nakdimen v. Baker, 100 Fed. [2d] 195); that pursuant to the agreement, the note was signed by defendant, the certificate of stock in favor of plaintiff for 200 shares was surrendered and duly canceled, and the shares represented thereby were transferred from said certificate into a certificate for 200 shares in favor of defendant's wife, such certificate being executed by defendant as president, and by plaintiff as secretary of the City National Company; that the certificate was endorsed by her and the consent of defendant's wife was signed by her, and the note so signed, the certificate so endorsed and the consent so signed, were on December 7, 1935, and since, held in the

possession of defendant until January 27, 1938, when this case was tried before Judge Ragan, when the note, the certificate and the consent were filed in court. The Court found that after the transfer of the 200 shares defendant on December 7, 1935, and thereafter, to February 9, 1936, on demand of plaintiff, refused to make delivery to plaintiff of said note, said certificate and said consent.

"The court further finds that defendant on December 7, 1935, and to February 9, 1936, for his failure to deliver the note signed, the certificate endorsed and the consent signed, stated as his reason therefor that he would not do so until he had received certain requested information with reference to a claim against him of the estate of Lillie N. Lazarus, deceased, and on February 3, 1936, after he had received the requested information, that he would not deliver the signed note, the endorsed certificate and the signed consent until there was a settlement of the claim of the estate of Lillie N. Lazarus, deceased, against him;

"That plaintiff thereupon employed local counsel, Thomas B. Pryor, Esq., of Fort Smith, Arkansas, as his attorney in the matter; that thereafter, on February 9th, 1935, defendant offered to deliver the signed note, the endorsed certificate, the signed consent, but refused to reimburse plaintiff for obligations incurred on account of said refusal to deliver said note, certificate and consent, and refused to do anything save to then deliver the signed note, endorsed certificate and signed consent.

"That thereafter in October, 1936, suit was brought in this court against Iser Nakdimen and Celia Nakdimen, his wife, and a trial was had on January 27th, and January 28th, 1938, resulting in a verdict in favor of the plaintiff for the face amount of said note, $13,125.00, plus certain interest; that an appeal was taken from the verdict and the judgment thereon to the United States Court of Appeals, and that court reversed and remanded the case, and *it held that the promissory note was not a binding obligation before*

its delivery, and that 'since the note in question was never delivered by Nakdimen, the maker, to Baker, the payee, Baker never acquired any property right in it. The most that he had was a right of action for breach of contract and an equitable lien upon the 200 (fol. 32) *shares of stock.'* That court held the ultimate question to be whether the action was in assumpsit for damages for breach of contract, or in tort for damages for *conversion* of personal property, and held the lower court submitted the case to the jury on the theory that it was an action in tort for *conversion,* and in doing so, erred.

"An amended petition was filed herein, on the reversal and remanding of the cause, which is a petition for damages for breach of contract.

"The court finds that the agreed sales price was by agreement of December 6, 1935, $13,125.00.

"The court finds that for the failure and refusal to deliver the note signed, and the Celia Nakdimen certificate endorsed, and her consent signed, created in plaintiff a right to recover the sales price, $13,125.00.

"The court finds that the reason assigned by the defendant for refusal to deliver on December 7, 1935, and subsequently, to February 9, 1936, were not reasons creating in law a just excuse for such refusal to deliver.

"The court finds that defendant having failed and refused to deliver the note, certificate and consent on and from December 7, 1935, to February 9, 1936, thereby became personally obligated to pay the purchase price, $13,125.00, and that plaintiff was not obliged on February 9, 1936, or thereafter, to accept delivery of said note, certificate and consent, and to forego his right of action for failure and refusal of defendant to deliver the note, certificate and consent."

The Court gave plaintiff's requests for conclusions of law (R. 25), which again set forth the agreement, and further were (R. 26) as follows:

"2. Plaintiff was not on February 9, 1936, after defendant's wrongful refusal to deliver on December 7, 1935, and up to and including February 8, 1936, obliged to accept delivery and forego his right of action for defendant's refusal to keep his agreement to deliver the note, certificate and consent theretofore.

"3. Defendant is not entitled to have this case transferred to the equity side of the court.

"4. Defendant is not entitled to have a judgment or decree that plaintiff should accept the note, dated December 6, 1935, the endorsed certificate in favor of Celia Nakdimen as security therefor, and the consent of Celia Nakdimen to the pledging of said certificate of the shares represented by said certificate.

"5. Plaintiff is entitled to recover from defendant the sum of $13,125.00 and costs of court, with interest thereon at 6% per annum from the date of judgment.

"6. Plaintiff is and was at the time of the filing of this suit and continuously since has been a citizen and resident of the State of Missouri, and the defendant, Iser H. Nakdimen, during the same time has been a citizen and resident of the State of Arkansas, and of the County of Sebastian in said state, and the amount in controversy, exclusive of interest and costs, exceeds the sum or value of $3,000.00."

The Court gave defendant's requested findings Nos. 1 and 2 (R. 27), which set forth the agreement.

Judge Lemley denied the further requests 3 to 12 (R. 28, 29) sought by defendant to the effect that any failure to deliver on December 7, 1935, was not a breach; that defendant did *not* breach the contract *"by the temporary postponement of the delivery of the note and other documents"*; that defendant tendered the note and other documents on December 7, 1935, and thereafter; that Baker on February 3rd offered to perform the contract and demanded performance, and plaintiff thereby *waived* any previous breach of contract, if there was a previous

breach; that the demand made by Baker on February 3, 1936, to perform the contract was an election to treat the contract as in full force and effect, and defendant had the right to accept that position and to tender full and complete performance on February 9th; "8. *The decision of the Court of Appeals in this cause OTHER THAN THE REVERSAL BECAUSE OF THE ERROR OF THE COURT IN TREATING THE CASE AS ONE IN CONVERSION AMOUNTS TO AN OPINION WHICH IS NOT BINDING UPON THIS COURT"; THAT THE SUIT IS NOT A SUIT FOR BREACH OF CONTRACT, BUT TO RECOVER THE PURCHASE PRICE NAMED IN THE CONTRACT, and "is based upon the theory that the contract was in full force and effect, and was not breached by the defendant except the allegation that the defendant had refused to pay the amount"*; that defendant was entitled to pay the note on December 7, *1940,* and the note is not due at this time; *that defendant was justified in his efforts to settle the other demand made upon him by the attorney for the plaintiff, and the evidence of the plaintiff and the evidence of the defendant is insufficient to show that Nakdimen abandoned or refused to perform the contract;* that the defendant has offered again and again to perform the contract, and is entitled to have the said contract performed, and is entitled to have until December 7, *1940,* to pay the note.

The Evidence on Which the Second Judgment Rested.

1.

The agreement between the parties of purchase and sale of the stock was found by the District Court to be the agreement as recited in the instruction of Judge Ragan (Record in 11,612, p. 22).

There can be no reasonable question, therefore, as a matter of fact, as to the terms of the agreement.

2.

Performance by Plaintiff.

There can further be no reasonable question, as a matter of fact, that plaintiff fully performed the agreement by canceling the shares theretofore held by him, and by his transfer on December 6, 1935, of the shares as agreed to defendant's wife, by certificate, for the 200 shares. *Plaintiff having fully performed his part of the contract, performance by defendant, according to the agreement, became due admittedly on December 7, 1936. Defendant was then required to make delivery of the note signed by him, the certificate endorsed by his wife, and the consent signed by his wife to plaintiff which defendant held on December 6, 1936, for delivery the next morning.*

3.

Breach of Contract.

There cannot be reasonable question, as a matter of fact, that the findings of fact of Judge Lemley, as above quoted, and as set forth on pages 23, 24 and 25 of the record, in 11,612, as to the breach of the contract by defendant, are borne out by the evidence. The testimony of defendant was most indefinite as to when he said he tendered the note, the certificate and the consent (R. 11,190, pp. 62, 63, 64), the effect of his testimony being he did not know when he made the claimed tender (R. 11,190, pp. 63, 64). The testimony of defendant and of his son was that defendant was to deliver December 7, 1935 (R. 11,190, pp. 61, 67, 68). His son Hiram testified, in effect, defendant refused to make delivery on December 7, 1935 (R. 11,190, pp. 67, 69). Defendant refused to perform on December 7 (R. 11,190, pp. 69, 74) his part of the contract, and from December 7, 1935, on (R. 11,190, pp. 44, 45, 46, 69), on continued demand of plaintiff, still refused to perform

his part of the contract, unless and until a claim of another, that had nothing to do with this one, was settled. (Defendant's son, it is true, also testified defendant four or five times a day—"innumerable times"—made tender of delivery [R. 11,190, pp. 76-77].)

There was no justification for the refusal on the part of Nakdimen. Between February 3 and February 9, 1936, plaintiff had employed local counsel (R. 11,190, pp. 46, 47).

CONTENTION OF APPELLANT.

The contention, in a word, of defendant, was that plaintiff should be denied his lawful remedy of compensation for the breach of contract of purchase and sale, fully performed by plaintiff in this action at law, and deliberately and unjustifiably breached by defendant, and that there should be an order for the dismissal of the case and that the plaintiff be ordered to accept the note, the certificate and the consent on the theory that plaintiff was obliged to so accept on February 9, 1936, when defendant got good and ready to make delivery, after he had theretofore without reason breached the agreement by refusing to do so, and that plaintiff must accept such undelivered note for $13,125.00 as payable December 6, 1940, two years after the original maturity date, as though it had been renewed.

AFFIRMANCE BY UNITED STATES COURT OF APPEALS.

The Appellate Court affirmed the judgment rendered by Judge Lemley.

CERTIORARI.

Defendant now seeks to have a further hearing by this Court.

POINTS AND AUTHORITIES.

I.

PETITIONER APPELLANT'S FOUR POINTS WERE WITHOUT MERIT.

Contention One of Appellant.

The first contention of appellant in the Court of Appeals that the lower court erred in refusing to transfer this cause to the equity docket, and in failing to compel appellee to specifically perform the contract involved, was without merit (Point VII in certiorari petition, page 33).

The District Judge having heard the case under the new rules of federal procedure *without a jury* by agreement, and having considered the alleged equitable defenses set up in the answer, and found them wanting, did not err in refusing to defendant "specific performance" *by plaintiff* of the contract. As plaintiff had completely performed on December 6, 1935, and defendant had deliberately refused to perform from that date to February 9, 1936, defendant was not on equitable principles in a position to assert any claimed right to specific performance *by plaintiff* of the contract. Plaintiff, if anyone, had a right to specific performance, not defendant. What defendant sought and seeks, is that the Court decree that plaintiff shall be required to forego the right the law gave him to compensation for defendant's deliberate, unjustifiable breach of contract, and that instead plaintiff be required by the Court to accept and receive instead the note and collateral deliberately withheld for over two months *as in full performance of defendant's obligation.* That is the "specific performance" appellant seeks—a specific performance he clearly is not entitled to. The obligation on defendant's part was to deliver the note and collateral on December 7, 1935, and was not an obligation on his part

to withhold and then offer, as in full performance of his obligation, to deliver after an unjustified refusal for over two months—when he got ready to do so.

Contention Two of Appellant.

Appellant's second contention was that the District Court erred in overruling the motion of defendant Nakdimen to dismiss the second amended complaint (Points I, II and III of certiorari petition, pages 21, 24 and 27).

Judge Lemley did not err in overruling the motion, as the second amended petition alleged the agreement, the performance by the plaintiff, the refusal to perform by the defendant, and sought compensation for the breach of the contract on the part of defendant.

Contention Three of Appellant.

The third contention of appellant was that the lower court, Judge Lemley presiding, erred in refusing to hold "that appellee Baker by his election and his demand of performance, by Nakdimen on February 3, 1936, conclusively elected to treat the contract as effective and binding, and that hence there could be no breach by Nakdimen," is without merit (Points V and VI of certiorari petition, page 32).

The fact plaintiff continued to demand on February 3, 1936, that defendant should do what defendant should have done on December 7, 1935, namely, deliver to plaintiff, pursuant to the terms of sale, the note and the endorsed certificate, *and that defendant then, as theretofore, deliberately and without justification refused so to do, in no respect ended the breach of the promise of defendant to deliver on December 7, 1935, or made such breach not a breach or waived or lessened it in any way.*

Defendant was, with or without demand, in pursuance of his promise, obligated to deliver on December 7, 1935.

Contention Four of Appellant.

Defendant's fourth contention was that the lower court erred in finding and deciding that defendant Nakdimen breached the contract on December 7, 1935 (Point IV in the certiorari petition, page 27).

The Court was amply justified from the evidence of plaintiff, from the evidence of defendant himself, and from the evidence of the son of defendant, that defendant not only failed but deliberately refused, without justification, to perform as agreed, on December 7, 1935, and thereafter, to and including February 9, 1935.

Sunderland Lectures on New Rules of Civil Procedure of the District Courts of the U. S., pages 2, 3 and 9;
1 Moore Federal Practice, Sec. 1.02, p. 35;
Carpenter v. Wabash Railway Co., 84 Advance Opinions, U. S. Supreme Court, 403;
Turn Verein Eiche v. Kionka, 255 Ill. 392, 99 N. E. 684, 687;
Emack v. Hughes, 74 Vermont 382, 52 Atl. 1061;
U. S. Auto Co. v. De Shong, 134 Ark. 392, 204 S. W. 103;
Sommer v. Nakdimen, 97 Fed. (2d) 715.

II.

THE WRIT OF CERTIORARI SOUGHT SHOULD BE DENIED.

Baker, as seller, having fully performed his part of the agreement of sale of the shares of the par value of $20,000 for an agreed purchase price of $13,125.00, by transferring the shares to Nakdimen, as buyer, and Nakdimen, having deliberately and without justification refused to perform his part of the agreement, namely, to deliver on December 7, 1935, to the seller Baker, Nakdimen note without interest in favor of Baker for $13,125.00, and the endorsed

certificate for the shares as collateral, and Nakdimen having continued without justification to so refuse delivery until February 9, 1936, plaintiff seller was entitled to recover $13,125.00 from the buyer Nakdimen, for the shares sold, and was not obliged to forego his right of action for compensation and accept delivery of the note and collateral on or after February 9, 1936, when Nakdimen, after deliberate refusal for over two months from the time agreed for his performance, finally got ready to then tender delivery *in full performance and settlement of his obligation to plaintiff*.

Neither law nor equity requires the seller to accept delivery of the secured note and to forego his right to compensation after over two months of deliberate, unjustifiable refusal of the buyer to perform by delivering his note and pledge.

When the seller has fully performed by a transfer to the buyer of the shares of stock sold, and the buyer is to contemporaneously deliver his note in favor of the seller in the amount of the agreed sales price therefor, with the endorsed stock certificate for the shares sold as collateral, and the buyer fails and refuses to so deliver the note and collateral, the compensation recoverable by the seller in an action for breach of the sale contract is such agreed sale price.

(As interest is by the judgment from the date of the judgment only, the question of what further interest prior thereto is recoverable is not here involved.)

12 L. R. A. (N. S.) 180, and Note;
Mechem on Sales, Sec. 1664;
6 Page on Contracts (2d ed.), Section 3226;
Bowman v. Branson, 111 Mo. 343, 19 S. W. 634;
Winningham v. Trueblood, 149 Mo. 572, 51 S. W. 399;
American Mfg. Co. v. Klarquist, 47 Minn. 344, 50 N. W. 243;

Deering v. Johnson, 86 Minn. 172, 90 N. W. 363;
Standard Lbr. Co. v. Deer Park Lbr. Co., 104 Wash. 84, 175 Pac. 578;
Haddaway v. Smith, 277 S. W. 728, 731;
Emack v. Hughes, 74 Vermont 382, 52 Atl. 1061;
Williston on Contracts, Revised Edition, Sec. 1295;
Kelly v. Pierce, 16 N. Dak. 234, 112 N. W. 995;
5 Williston on Contracts, Revised Edition 1937, Sec. 1471, Note 2;
Sutherland on Damages, Vol. 2, Sec. 644, page 2228;
Mechem on Sales, Vol. 2, pages 1364, 1365;
Klosterman v. Lubin, 113 W. Va. 353, 167 S. E. 871;
55 C. J., Sec. 946, page 944;
Hodges v. Blythe, 69 Okla. 163, 171 Pac. Rep. 16;
Giroux v. Bockler, 98 Ore. 398, 194 Pac. 178;
12 American Jurisprudence, Sec. 307, pages 862, 863;
24 R. C. L., page 97, Sec. 363;
5 Elliott on Contracts, Section 5081, page 1227.

ARGUMENT.

I.

PETITIONER APPELLANT'S FOUR POINTS BEFORE THE UNITED STATES COURT OF APPEALS WERE WITHOUT MERIT.

Contention One of Appellant.

The first contention of appellant that the district court erred in refusing to transfer this cause to the equity docket, and in failing to compel appellee to specifically perform the contract involved, was without merit. (Point VII here.)

The District Judge having heard the case with the new rules of federal procedure in effect, without a jury by agreement, and having considered the alleged equitable defenses set up in the answer, and having properly found them wanting, did not err in refusing to defendant "specific performance" by plaintiff of the contract. As plaintiff had completely performed by transferring his shares to defendant on December 6, 1935, and defendant had deliberately refused to perform from that date to February 9, 1936, defendant was not on equitable principles in a position to assert any claimed right to specific performance by plaintiff of the contract. Plaintiff, if anyone, might have had a right to specific performance, but not defendant. What defendant sought and seeks, is that the Court decree that plaintiff shall be required to forego the right the law gave him to compensation for defendant's deliberate, unjustifiable breach of contract, and that instead plaintiff should have been required by the Court to accept and receive the note and collateral deliberately withheld for over two months, as in full performance of defendant's obligation. That is the "specific perform-

ance" appellant wants—a specific performance he clearly is not entitled to. The obligation on defendant's part was to deliver the note and collateral on December 7, 1935, and was not an obligation on his part deliberately and unjustifiably to withhold and then offer as in full performance of his obligation to deliver when he got ready to do so after the refusal for over two months.

It was plaintiff that performed his part of the contract and defendant who refused to perform his obligation under the contract.

That being true, defendant had no right to "specific performance" of the contract.

The rules of civil procedure of the District Court of the United States have eliminated the conformity act, and the federal equity rules, and constitute a complete code of practice identical for law and equity. All procedural distinctions between law and equity have been abolished. In both law and equity there are the same pleadings, the same form of averments, the same motions, the same rules as to parties, the same counterclaims, the same joinder of actions, the same discovery, the same references, the same form of judgments (Printed Lectures of Edson R. Sunderland, before the Bar Association of St. Louis, September 29, 1938, pages 2 and 3). 1 Moore Federal Practice, Sec. 1.02, p. 35.

The new federal rules that took effect while the suit was pending are controlling. Carpenter v. Wabash Railway Co., 84 Advance Opinions, United States Supreme Court, page 403, January 29, 1940.

In pleading under the new rules a short and plain statement of the claim, showing that the pleader is entitled to relief, is all that is required. Neither the term "facts" nor "cause of action" are used, nor are "evidence" or "conclusions" prohibited. Rule 8 (a) (b). The test of a

good allegation is information sufficient to enable the party to plead and prepare for trial. Rule 12 (e) (Sunderland, Lecture before St. Louis Bar Association, September 29, 1938, page 9).

The second amended petition was governed by the rules of civil procedure for the District Courts of the United States, which became effective September 1, 1938, the reversal and remanding on the first appeal being thereafter and the second amended petition having been filed February 4, 1939.

This Case Was Heard by the Trial Court Without a Jury.

The District Court did not err in holding the Court should not compel Baker by "specific performance" to accept instead of damages, the belated delivery tendered February 9, 1936.

In Enelow v. New York Life Ins. Co., 293 U. S. 379, January 7, 1935, a case decided before the new rules went into effect, Section 274-B of the Judicial Code, U. S. C., Title 28, Sec. 398, which provides for equitable defenses in actions at law, was considered.

In the Enelow case it was held that a defendant was not entitled to trial to the Judge as Chancellor of an equitable defense set up in an action at law, under the provision therefor, in Judicial Code, Sec. 274-B, U. S. C. 28, Sec. 398, when a bill in equity to stay the action at law pending the termination of the issue, would not lie. The Court said (page 383):

> "The test under Section 274-B is whether the defendant could have maintained a bill in equity on the same averments. The unequivocal language of the provision leaves no room for the argument that the substantive jurisdiction of equity was sought to be changed or enlarged. The defendant's rights to a hearing in equity are the same, not greater, when he resorts to the summary procedure."

To maintain defendant's position it was incumbent on defendant to prove facts entitling him to the remedy sought, and to come into equity he had to come with clean hands, and such proof was not forthcoming.

As appears here beyond question, there was nothing on the part of the plaintiff to perform, for plaintiff had fully and completely performed everything he was required to do, when on December 6, 1937, he transferred his 200 shares of $100 par each, pursuant to the contract of sale. After that there was no further thing for him to do under the contract. After that it was for defendant to make the contemporaneous delivery, as agreed, on December 7, 1935, of the note and of the certificate endorsed.

In Turn Verein Eiche v. Kionka, 255 Ill. 392, 99 N. E. Rep. 684, 687, the rule with respect to the right to specific performance is stated as follows:

> "The party seeking to enforce specific performance must prove he has complied with, or that he was able, ready, and willing to comply with, *the terms of the contract, but was prevented from doing so by the refusal of the other party to perform it on his part.* The proof in such cases must be clear and satisfactory. Ralls v. Ralls, 82 Ill. 243; Rutherford v. Sargent, 71 Ill. 339; Hatch v. Kizer, 140 Ill. 583, 30 N. E. 605, 33 Am. St. Rep. 258.
>
> "*Where the parties have made the time of performance material, a court of equity has no power to enforce performance contrary to the expressed intention of the parties* (Skeen v. Patterson, 180 Ill. 289, 54 N. E. 196), and courts will indulge no presumptions in favor of a waiver or abandonment of the contract, nor will they infer waiver or abandonment from slight proof."

See, also, Emack v. Hughes, 74 Vermont 382, 52 Atl. 1061.

For defendant to be entitled to "specific performance" he was required to show defendant performed, that plaintiff did not perform and that plaintiff should be required to perform.

Here plaintiff performed and defendant without any excuse refused to perform.

No basis for "specific performance" is present.

Contention Two of Appellant.

Appellant's second contention was that the District Court erred in overruling the motion of defendant Nakdimen to dismiss the second amended complaint (Points I, II and III here).

Judge Lemley did not err in overruling the motion, because the second amended petition alleged the agreement, the performance by the plaintiff, the refusal to perform by the defendant, and sought compensation for the breach of the contract.

Again it appears, on page 23 of appellant's brief, that "the defendant in his answer to the second amended complaint sets up estoppel due to the inconsistent position taken by the plaintiff in the conversion suit and in this suit (R. 17)." It was contended, page 23, appellant Nakdimen's brief in the Court of Appeals in the second appeal, "*that the case must be dismissed because it cannot be maintained upon conversion, and it cannot be changed from conversion to contract.*"

In this case the action is by plaintiff for compensation for a breach in which plaintiff, as seller, has transferred title and possession to the shares to defendant and has fully performed, and in which defendant failed to keep his agreement to contemporaneously deliver the note and the certificate for the shares endorsed as collateral for the note.

The first contention under this head of defendant's

brief is that this suit cannot be maintained upon conversion. It will be remembered that this suit was held by this Court on the first appeal *on the contention of defendant* NOT to be a suit in conversion, *that it could not be because the note had not been delivered*, and therefore the note as a note of plaintiff could not be converted and that the action was for breach of contract.

The new or second amended petition alleges the agreement found by this Court to exist, alleges the full and complete performance of everything plaintiff was to do by the transfer by him of the shares to defendant's nominee, and the failure on the part of defendant as agreed by him to contemporaneously deliver the note to plaintiff, along with the endorsed certificate as collateral, and the petition sought compensation for this breach on the part of defendant. This is, it would seem, a petition for breach of contract.

The next contention is that the former petition, now contended by defendant to have been in conversion, cannot be changed from a petition in conversion to one in contract and that the case should have been dismissed.

It would seem that it does not lie in the mouth of plaintiff, who asserted in the Court of Appeals in the first appeal that the then petition was in contract, to now assert that it was not then in contract, but was in conversion.

Moreover, in U. S. Auto Company v. De Shong, 134 Ark. 392, 204 S. W. 103, the question of dismissal was considered and denied and the Court said with reference to the case of Grist v. Lee, relied on by petitioner at page 21 of his petition and brief in this Court:

> "It is true we have several times said that one may not sue for a tort and recover upon a contract. A number of cases so holding are cited in the case of Grist v. Lee, 124 Ark. 206, which is to the same effect * * *.

> "Appellee asked and was granted relief to which he was not entitled; but that fact furnishes no sufficient reason for refusing him the relief to which the undisputed evidence shows he is entitled * * *.
>
> "If the cause were dismissed, the trial of another suit would be in the same court, between the same parties and upon the same testimony * * *. Such circuity of action is contrary to the spirit and policy of our code of practice, and will not be required."

This statement of the spirit and policy of the code of practice of Arkansas appears in accord with Rule I of the Rules of Civil Procedure for the District Court of the United States, such ruling providing that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action."

We respectfully submit that none of these contentions deserves further consideration.

The defendant contended, page 35 of the brief in the Court of Appeals:

> "What this court said in the conversion suit, 'The most that he (Baker) had was a right of action for breach of contract,' is obiter dicta, pure and simple."

It was contended further by defendant on page 37:

> "The negotiations in the making of the contract and the conduct of the parties thereto, tend to show a *constructive* delivery of the note, the consent and the certificate."

The contention of defendant now is, in effect, that the Court of Appeals erred in reversing the case on the first appeal on the ground there was no delivery.

This, of course, is in the face of the Court of Appeals' decision on the first appeal.

That Court took the position on the first appeal that as

the note had not been delivered, the action could not be considered as an action for its conversion, and that the action was, therefore, for the breach of the contract to deliver. (No mention was made by the Court of Appeals on the first appeal of respondent's right of action on the stock certificate.)

Judge Lemley did not err in overruling defendant's motion to dismiss the second amended petition in contract.

Contention Three of Appellant.

The third contention of appellant was that the lower court, Judge Lemley presiding without a jury, erred "in refusing to hold that appellee Baker by his election and his demand of performance, by Nakdimen on February 3, 1936, conclusively elected to treat the contract as effective and binding. Hence there could be no breach by Nakdimen," is without merit. (Points V and VI here.)

The fact plaintiff continued to demand on February 3, 1936, that defendant should do what defendant should have done on December 7, 1935, namely, deliver to plaintiff; pursuant to the sale, the note and the endorsed certificate, and the further fact that defendant then, as theretofore, deliberately and without justification refused so to do, in no respect ended the breach of the promise of defendant to deliver on December 7, 1935, or thereafter, or made such breach not a breach or waived or lessened it in any way.

Defendant was, with or without demand, in pursuance of his promise, obligated to deliver on December 7, 1935.

We need not repeat what we have said on these contentions.

Had defendant buyer on February 3, 1936, on demand of plaintiff, tendered delivery of the note and collateral, *and plaintiff received and accepted* the note and collateral

there would have been even then not a waiver of the prior breach from December 6, 1935, to that date, but a delivery receipt and acceptance, with the right still remaining in plaintiff to sue for any damages resulting from the breach up to that time.

But, and it is an important "but," defendant on February 3, 1936, as he had theretofore on demand, still deliberately and unjustifiably refused delivery, and the breach was on that day, as it was theretofore, still a breach.

The breach did not by such refusal on February 3rd cease to be such because of its then continuance or reiteration. Defendant still refused delivery unjustifiably, as he well knew, until a claim of another against him was settled. The *breach* was not by plaintiff on February 3, 1936, approved, assented to, ratified or in any way waived, and plaintiff, finding defendant obdurate in his attitude, then had to employ Mr. Pryor, of Fort Smith, as local counsel, to aid him in the situation. There was thus created in plaintiff, for defendant's deliberate, unjustified breach of over two months, of an obligation by contract required to be performed December 7, 1935, a right to recover $13,125.00.

Defendant's offer to deliver on February 9, 1936, plaintiff could either accept or reject. He was then willing to accept, as appears from the evidence, if defendant would reimburse him for the out-of-pocket expenses he had had to incur, due to defendant's unjustified refusal to deliver, otherwise he would not accept delivery February 9, 1936.

Defendant insisted plaintiff should stand the expense, and that plaintiff should then accept the belated delivery in *full* performance of defendant's obligation under the contract.

In other words, when defendant got good and ready to deliver, plaintiff, it is contended, was bound to receive

and accept the delivery that defendant was obligated to make December 7, 1935, over two months before.

And defendant asked the Court of Appeals to require the plaintiff to now accept delivery of the withheld undelivered note for $13,125.00 and the withheld undelivered collateral in full performance of defendant's promise to deliver on December 7, 1935, and that this Court order and adjudge that the undelivered note by its terms, due December 6, 1938, should be deemed to have been extended to December 6, 1940, and that the Court hold defendant should not be required to pay until December 6, 1940, the amount named in the original note for $13,125.00, and that this action should be dismissed.

This is a suit for breach where plaintiff has sold and delivered. It is a suit by a seller against a buyer, wherein the seller has fully performed by delivery of the thing sold, and the buyer has completely failed to deliver the note and the collateral for the thing sold. It is clear that with the duty on the defendant to deliver on December 7, 1935, there was a failure on the part of the defendant to then deliver. Demand could take away nothing from the buyer's obligation fixed by the agreement that defendant was to deliver the morning of December 7, 1935. The contention, however, now of the defendant is that because plaintiff on February 3, 1936, again demanded of defendant, or continued to demand, that he do what defendant was required to do by the terms of the agreement on December 7, 1935, that plaintiff thereby *waived* the failure to perform of defendant, *though the further fact is, as testified to by the plaintiff without denial by defendant that defendant then, as theretofore, refused to perform.*

The contention then is that the demand of performance and the refusal to perform on February 3, 1936, makes

that not a breach which was a breach then and theretofore.

We have never been able to follow this contention.

The breach continued from December 7, 1935, to February 9, 1936, as found on substantial evidence by the court below. Defendant by his conduct created a right in plaintiff to compensation for this breach, and, having done so, the breach is in no sense removed by the fact that subsequently defendant tendered delivery on and after February 9, 1936.

Contention Four of Appellant.

Defendant's fourth contention was the district court erred in finding and deciding that defendant Nakdimen breached the contract on December 7, 1935. (Point IV here.)

The Court was amply justified from the evidence of plaintiff, from the evidence of defendant himself, and from the evidence of the son of defendant, that defendant not only failed but deliberately refused, without justification, to perform as agreed, on December 7, 1935, and thereafter, to and including February 9, 1935.

We have shown fully in the statement and throughout the brief heretofore that defendant breached his contract on December 7, 1935. Plaintiff's testimony so shows. Defendant's testimony was uncertain. Defendant's son's testimony was that from December 9, 1935, for about two weeks, defendant as many as five times a day, "innumerable times," made tender to the plaintiff of the note and the collateral, and that plaintiff each time refused to accept it. The Court evidently did not believe that defendant made the tender "innumerable times" during this two weeks' period. It is clear from the evidence that defendant refused to deliver on December 7th, and the reason

for his refusal was the unjustifiable one that this plaintiff had to cause a settlement of a claim of another against defendant before defendant would make delivery. That claim of such other was never settled because the Court of Appeals in the suit on such other claim found that although Nakdimen acknowledged the obligation to such other by making a $40.00 payment thereon, still the Statute of Limitation of Arkansas barred recovery under its three-year statute, the suit having been brought not within three, but within five years. Sommer v. Nakdimen, 97 Fed. (2d) 715. At page 49 of petitioner's brief in the Court of Appeals it was contended that Baker's evidence as to Nakdimen's statements failed to show an absolute and unequivocal demand. The evidence is clear from the testimony of defendant's son and of defendant that defendant refused on December 7th to deliver and did so for the unjustifiable reason above mentioned. It is beyond question and not disputed, that on February 3, 1936, there was an absolute and unequivocal refusal to perform on the part of defendant, when he said he would not deliver until the other case was settled. Such evidence is sufficient to show that defendant absolutely and unequivocally refused to perform.

Defendant at page 56 of petitioner's brief in the Court of Appeals asked the Court to consider his points 3 and 4 together, to the effect that there was no breach, as a matter of fact shown, and second, that if there was a breach shown, that Baker by continuing on February 3, 1936, to demand performance of defendant, *and defendant's refusal then to perform*, thereby waived the breach on February 3rd, and on all the preceding days back to and including December 7th.

On page 58 in the Court of Appeals' brief there was reference made to documents Nakdimen wanted in connection with the other claim, that of Mrs. Lazarus, as executor,

against Nakdimen. The conduct of plaintiff, it is contended in connection with this other claim, in furnishing him certain information that the defendant wanted, was a waiver by plaintiff of defendant's obligation to perform on December 7th.

We cannot agree.

When, thereafter, on February 3, 1936, after defendant had received this information, about January 15, 1936, defendant still persisted in refusal, plaintiff certainly had the right to deem the refusal that had continued up to that time, to be the settled position of defendant, so as to justify employing Mr. Pryor, and to have the right to compensation for such breach of contract. When, therefore, defendant did finally discover, on February 9, 1936, as he said, that "two wrongs did not make a right" (R. 45), and offered to deliver to Baker but refused to pay any of the obligations that his refusal had caused Baker to incur, it appears there was no obligation on Baker to then accept the delivery offered by defendant.

II.

CERTIORARI SHOULD BE DENIED.

Baker, as seller, having fully performed his part of the agreement of sale of the shares of the value and for a purchase price of $13,125.00 by transferring the shares to Nakdimen, as buyer, and Nakdimen, having deliberately and without justification refused to perform his part of the agreement, namely, to deliver on December 7, 1935, to the seller, Baker, as payment for the shares sold, Nakdimen's note in favor of Baker for $13,125.00, and the endorsed certificate for the shares as collateral, and Nakdimen having continued without justification to so refuse delivery until February 9, 1936, plaintiff seller was entitled to re-

cover $13,125.00 from the buyer Nakdimen, for the shares sold, and was not obliged to forego his right of action for compensation and accept delivery on or after February 9, 1936, when Nakdimen, after deliberate refusal for over two months from the time agreed for his performance, finally got ready to tender delivery.

Neither law nor equity requires the seller to thus accept delivery of the note in full payment and forego his right to compensation after over two months of deliberate, unjustifiable refusal of the buyer to perform.

When the seller has fully performed by a transfer to the buyer of the shares of stock sold, and the buyer is to contemporaneously deliver his note in favor of the seller in the amount of the agreed sales price therefor, with the endorsed stock certificate for the shares sold as collateral, and the buyer fails and refuses to so deliver the note and collateral, the compensation recoverable by the seller in an action for breach of the sale contract is such agreed sale price. As interest is by the judgment from the date of the judgment only, the question of what further interest prior thereto is recoverable is not here involved.

There is abundant authority to sustain the position that where the seller has delivered the cause of action arises immediately for breach of an agreement by the buyer to give promissory notes payable in the future.

12 L. R. A. (N. S.) 180, and note;
Mechem on Sales, Sec. 1664;
6 Page on Contracts (2d ed.), Section 3226.

In *Bowman v. Branson*, 111 Mo. 343, 19 S. W. 634, plaintiff brought suit for defendant's failure to give certain promissory notes in compliance with the contract between plaintiff and defendant, plaintiff having fully performed his part of the contract, and it was held that plaintiff had an action for the breach of the contract to execute and de-

liver the notes, and the measure of damages was the face value of the notes, with interest according to their tenor, although the notes, if they had been executed, would not have been due at the time of the trial.

In *Winningham v. Trueblood,* 149 Mo. 572, 51 S. W. 399, plaintiff loaned $1,000.00 to defendant, for which defendant was supposed to give plaintiff a note and a mortgage. Plaintiff forwarded the $1,000.00 to defendant, but defendant did not deliver the note and mortgage. There were other issues in this case, but the Court indicated that plaintiff properly had a cause of action against defendant for the failure to deliver the note in accordance with the contract.

In *American Manufacturing Co. v. Klarquist,* 47 Minn. 344, 50 N. W. 243, it was held that damages may be recovered presently for breach of an agreement to execute a promissory note payable in the future, and the amount for which the note was to be given will prima facie be the measure of damages.

See, also, Deering v. Johnson, 86 Minn. 172, 90 N. W. 363;
Standard Lumber Co. v. Deer Park Lbr. Co., 104 Wash. 84, 175 Pac. 578.

In *Haddaway v. Smith* (Texas), 277 S. W. 728, 731, plaintiffs, as real estate brokers, were suing for commissions. Plaintiffs had secured purchasers for defendant's real estate, but defendant had not fulfilled the contracts. For some time plaintiffs, without success, attempted to induce defendant to perform the contracts. On January 8th defendant was notified that the contracts were forfeited, and that the purchasers would expect their money back. Defendant claimed that on January 10th he had offered to perform the contract. The Court held that it was not a waiver for a party not in default to make an honest effort to induce the party who had breached the contract to withdraw the repudiation and perform the contract.

In *Emack v. Hughes,* 74 Vt. 382, 52 Atl. 1061, the seller made an offer of delivery after breach of the contract, and the Court held, at page 1064: "Upon breach, the plaintiff's (buyer's) right of action accrued and could not be defeated nor affected by a subsequent offer to perform."

In *Williston on Contracts,* Sec. 1295, it is indicated that if the conduct of the promisor justifies the promisee in believing that no further performance will be rendered after breach, the promisee is justified in changing his position, and thereafter a tender of full performance will be ineffectual, and further, that when there has been an actual breach of the contract, the plaintiff's right of action accrues and cannot be defeated by a subsequent offer to perform.

In *Kelly v. Pierce,* 16 N. Dak. 234, 112 N. W. 995, it was held:

> "A vendee who refuses to perform his agreement to execute notes for the purchase price of personal property sold and delivered to him, may be sued by the vendor for damages for breach of the contract made upon the refusal to deliver the notes, and the measure of damages will be the contract price."

The Court stated:

> "We find that the great weight of authority is to the effect that, upon repudiating the agreement to execute notes, the vendor may at once sue for damages for breach of the contract. The vendor may withdraw his agreement to give credit upon the failure of the vendee to complete the contract according to its terms. We deem this the better rule, as it gives to each party the fruits of the contract. The following authorities fully substantiate this rule as to the remedy, as well as to the measure of damages: Hanna v. Mills, 21 Wend. 90, 34 Am. Dec. 216; Foster v. Adams, 60 Vt. 392, 6 Am. St. Rep. 120, 15 Atl. 169;

Young v. Dalton, 83 Tex. 497, 18 S. W. 819; Hays v. Weatherman, 14 Ind. 341; Carnahan v. Hughes, 108 Ind. 225, 9 N. E. 79; Mechem, Sales, Sec. 1664; Barron v. Mullin, 21 Minn. 374; Parson, Contr., 6 ed., 211; 24 Am. & Eng. Enc. Law, p. 1123, and cases cited; Stephenson v. Repp, 47 Ohio St. 551, 10 L. R. A. 620, 25 N. E. 803."

In 5 Williston on Contracts, Revised Edition 1937, Sec. 1471, Note 2, it is stated:

"Breach of a contract to execute a promissory note, payable in the future, gives rise to an immediate right of action on the contract seems unquestioned," and cites:

Deering v. Johnson, 86 Minn. 172, 90 N. W. 363;
Bowman v. Branson, 111 Mo. 343, 19 S. W. 634;
Kelly v. Pierce, 16 N. Dak. 234, 112 N. W. 995, 12 L. R. A. (N. S.) 180;
Giroux v. Bockler, 98 Oregon 398, 194 P. 178;
Standard Lbr. Co. v. Deer Park Lbr. Co., 104 Wash. 84, 175 P. 58, 176 P. 332.

At page 3933, Sec. 1411, he states:

"An action will lie for breach of the special promise to give the negotiable instrument and in such an action the damages are fixed by the amount of the agreed instrument."

Deering v. Johnson, 86 Minn. 172, 90 N. W. 363;
Bowman v. Branson, 111 Mo. 343, 19 S. W. 634;
Kelly v. Pierce, 16 N. Dak. 234, 112 N. W. 995, 12 L. R. A. (N. S.) 180;
Giroux v. Bockler, 98 Oregon 398, 194 P. 178;
Standard Lbr. Co. v. Deer Park Lbr. Co., 104 Wash. 84, 175 P. 58, 176 P. 332;
American Mfg. Co. v. Klarquist, 47 Minn. 344, 50 N. W. 243;
Hanna v. Mills, 21 Wend. (N. Y.) 90, 34 Am. Dec. 216;
Rinehart v. Olwine, 5 Watts & S. (Pa.) 157.

In Sutherland on Damages, Vol. 2, Sec. 644, at p. 2228, it is stated:

"Where goods are sold to be paid for by bill or note payable at a future day, and the bill or note is not given, general assumpsit for goods sold and delivered cannot be maintained until the credit has expired, but the vendor may sue at once on the special agreement and recover the whole amount for which the bill or note should have been given or the value of the goods. (Copeland v. Fowler, 151 N. C. 353; Kelly v. Pierce, 16 N. D. 234, 12 L. R. A. [N. S.] 180; Thomas Mfg. Co. v. Watson, 85 Me. 300; Geiser Mfg. Co. v. Halzer, 110 Minn. 138; Hutchinson v. Reed, 3 Camp. 329; Mussen v. Price, 4 East 147; Haskins v. Duperoy, 9 East 498; Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410; Loring v. Gurney, 4 Pick. 16; Hunneman v. Grafton, 10 Mete. [Mass.] 454; Fuller v. Sweet, 30 Mich. 237, 18 Am. Rep. 122; Barron v. Mullen, 21 Minn. 374; McCormick v. Basal, 46 Iowa 235; Rinehart v. Olwine, 5 W. & S. 157; Bicknell v. Buck, 58 Ind. 354; Stoddard v. Mix, 14 Conn. 12; Carnahan v. Hughes, 108 Ind. 225; Stephenson v. Ripp, 47 Ohio St. 551, 10 L. R. A. 620; Hanna v. Mills, 21 Wend. 90, 34 Am. Dec. 216; Am. Mfg. Co. v. Klarquist, 47 Minn. 344; Girard v. Taggart, 5 S. & R. 19, 19 Am. Dec. 716; Manton v. Gammon, 7 Ill. App. 201; Foster v. Adams, 60 Vt. 392, 6 Am. St. 120; Young v. Dalton, 83 Tex. 497; Osborne v. Bell, 62 Mich. 214.

"Such right of action rests not only upon the idea of breach of a special promise to give the evidence of indebtedness but also upon the theory that by the custom of merchants the note or bill might be made by getting it discounted."

In Mechem on Sales, Vol. 2, p. 1364, it is stated:

"But if the term of credit were given upon the condition that the buyer should give a note or other security for the price, and the buyer upon demand refuses to give the note or security as agreed, the seller, while he may not perhaps maintain assumpsit for the goods sold until that credit has expired, may yet sue imme-

diately for the breach of the special agreement and recover as damages the whole value of the goods, less, perhaps, the interest for the stipulated period."

Hanna v. Mills, 1893, 21 Wend. (N. Y.) 90, 34 Am. Dec. 216;
Foster v. Adams, 1888, 60 Vt. 392, 15 Atl. R. 169, 6 Am. St. R. 120;
Young v. Dalton, 83 Tex. 497, 18 S. W. 819 (citing Hanna v. Mills);
Hays v. Weatherman, 14 Ind. 341;
Rinehart v. Olwine, 5 Watts & Serg. 162;
Morgan v. Turner, 1893, 4 Tex. App. 192, 23 S. W. 284;
Carnahan v. Hughes, 108 Ind. 225, 9 N. E. 79;
Osborne & Co. v. Bell, 1886, 62 Mich. 214, 28 N. W. 841;
Kokomo Strawboard Co., 1892, 134 N. Y. 92, 31 N. E. 248.

In *Klosterman v. Lubin*, 167 S. E. 871, 113 W. Va. 353, 364, it was held that where title has passed and the buyer breaches, the seller may sue for the full purchase price.

In 55 C. J., Sec. 946, page 944, the rule of the right to recover where there has been performance by the seller and title has passed to the buyer and the buyer has failed to pay the price as agreed, is recognized for the price or value of the goods.

In *Hodges v. Blythe*, 69 Okla. 163, 171 Pac. Rep. 16, the Court citing the North Dakota case, Kelly v. Pierce, and the case of Stephenson v. Repp, stated:

"While the general rule seeming to be that where goods are sold, to be paid for by a note due and payable at a future time and the note is not given, the seller cannot recover in assumpsit on the general count for goods sold and delivered until the credit has expired, yet it is almost universally held that he may immediately proceed for a breach of the special agreement to give the note. In this jurisdiction, how-

ever, where but one form of action is recognized, if the facts pleaded and proved established that a party is entitled to relief in any form (whether as in the instant case, for the purchase price of goods sold, or, nominally for damages for breach of a special contract), it would seem that he may obtain such relief in the only action known to the Code. The evidence here clearly shows a refusal of defendant to execute the notes as he had agreed for the purchase price of the automobile, which under the authorities, immediately gave rise to the very cause of action upon which recovery was had. In Stephenson v. Repp, 47 Ohio St. 551, 25 N. E. 803, 10 L. R. A. 620, it is held:

> " 'Where goods are purchased upon an agreement to give a promissory note for the price, payable in one year with interest, on a refusal of the purchaser to make and deliver the note after the goods have been delivered, the vendor may, without waiting for the expiration of the credit, maintain an action at once for the breach of the agreement, and the measure of damages will be the price of the goods sold and delivered.' "

In the body of the opinion it is said:

> " 'The plaintiff in error claims that the petition below does not state facts sufficient to constitute a cause of action, for the reason that the time of the credit on which the goods had been sold and delivered had not expired at the bringing of the action, and that he was not, therefore, so indebted to the plaintiff as that an action could be maintained for the price of the property sold and delivered. It will be conceded that under the common-law system of procedure a general assumpsit for goods sold and delivered could not have been maintained upon the facts stated in the petition—the time of the credit not having expired, there would have been no ground for averring an implied assumpsit. But this is not material under our system, where no particular form of action is recognized, and the plaintiff is entitled to recover, if

it appears from the facts stated in his petition that he is entitled to any relief. * * * The law applicable to the case is well stated by Brown, J., in Hanna v. Mills, 21 Wend. 90 (34 Am. Dec. 216); "When goods are sold to be paid for by a note or bill payable at a future day, and the note or bill is not given, the vendor cannot maintain assumpsit on the general count for goods sold and delivered, until the credit has expired; but he can sue immediately for a breach of the special agreement. Mussen v. Price, 4 East 147; Dutton v. Solomonson, 3 Bos. & P. 582; Hoskins v. Duperoy, 9 East 498; Hutchinson v. Reid, 3 Campb. 329. In such an action he will be entitled to recover as damages the whole value of the goods, unless, perhaps, there should be a rebate of interest during the stipulated credit. The cases referred to by the counsel for the plaintiff in error give no countenance to the argument in favor of a different rule of damages. The right of action is as perfect on a neglect or refusal to give the note or bill as it can be after the credit has expired. The only difference between suing at one time or the other relates to the form of the remedy; in the one case the plaintiff must declare specifically, in the other he may declare generally: The remedy itself is the same in both cases. The damages are the price of the goods. The party cannot have two actions for one breach of a single contract; and the contract is no more broken after the credit expires than it was the moment the note or bill was wrongfully withheld." ' See, also, Kelly v. Pierce, 16 N. D. 234, 112 N. W. 995, 12 L. R. A. (N. S.) 180."

In *Giroux v. Bockler*, 98 Oregon 398, 194 Pac. 178, 183, 184, the Court stated:

"* * * where the defendant is in default in payments that were due, and he also refuses to perform the contract by executing the notes that would become due at the future dates under the terms of the contract the seller is on such state of facts entitled to the remedy against such breach by immediate en-

forcement of the whole obligation, such right existing by reason of the buyer's breach of agreement as a whole. 24 R. C. L., pp. 97, 98; Kelly v. Pierce, 16 N. D. 234, 112 N. W. 995, 12 L. R. A. (N. S.) 180; Stephenson v. Repp, 47 Ohio St. 551, 25 N. E. 803, 10 L. R. A. 620; Pasha v. Bohart, 45 Mont. 76, 122 Pac. 284, Ann. Cas. 1913C, 1250."

Time, at law, is of the essence of the contract (12 Am. Jur., Section 307, page 862). In equity, where there is an express stipulation, time is also of the essence (12 Am. Jur., p. 863).

In 24 R. C. L., page 97, Section 363, it is stated: that when goods are sold to be paid for by note or bill payable at a future day, and the note or bill is not given, the seller "can sue immediately for a breach of the special agreement," citing Hanna v. Mills, 21 Wend. (N. Y.) 90, 34 Am. Dec. 216; Kelly v. Pierce, 16 N. D. 234, 112 N. W. 995, 12 L. R. A. (N. S.) 180; Stephenson v. Repp, 47 Ohio St. 551, 25 N. E. 803, 10 L. R. A. 620; Girard v. Taggart, 5 Serg. & R. (Pa.) 19, 9 Am. Dec. 327. See, also, Bradford v. Marbury, 12 Ala. 520, 46 Am. Dec. 264; Sidney School Furniture Co. v. Warsaw School Dist., 122 Pa. St. 494, 15 Atl. 881, 9 A. S. R. 124. Notes: 34 Am. Dec. 216; 3 L. R. A. (N. S.) 909. This right of action "is as perfect on a neglect or refusal to give the note or bill as it can be after the credit has expired * * *. *Where the provision for credit is not absolute but conditional on the buyer giving certain security for the price, it is held that on his failure to do so his right to the credit is lost and the seller may sue immediately for the price.*" (Citing Pasha v. Bohart, 45 Mont. 76, 122 Pac. 284, Ann. Cas. 1913 C 1250 [credit conditional on giving "bankable note"]; Foster v. Adams, 60 Vt. 392, 15 Atl. 169, 6 A. S. R. 120. Note: 12 L. R. A. [N. S.] 181.)

In 5 Elliott on Contracts, Section 5091, page 1227, it is stated:

> "Where the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against the buyer for the price of the goods. *This is self-evident, and is universally conceded.*" (Citing Scott v. England, 2 Dowl. & L. 520; Olcese v. Mobile Fruit & Trading Co., 211 Ill. 539, 71 N. E. 1084; Armstrong v. Turner, 49 Md. 589; Mitchell v. Le Clair, 165 Mass. 308, 43 N. E. 117; Meagher v. Cowing, 149 Mich 416, 112 N. W. 1074; Wood v. Michaud, 63 Minn. 478, 65 N. W. 963; Hayden v. Demets, 53 N. Y. 426.)

The author further states:

> "* * * where by the contract payment of the whole or part of the price is deferred, and the buyer is to give a note or the like for the deferred payment, and fails to do so, the seller may maintain an action for breach of the contract before the expiration of the time of credit." (Citing Paul v. Dodd, 2 C. B. 800; Mussen v. Price, 4 East 147; Carnahan v. Hughes, 108 Ind. 225, 9 N. E. 79; Barron v. Mullin, 21 Minn. 374; Hanna v. Mills, 21 Wend. [N. Y.] 90; Nichols v. Scranton Steel Co., 137 N. Y. 471, 33 N. E. 561; Stephenson v. Repp, 47 Ohio St. 551, 25 N. E. 803, 10 L. R. A. 620; Girard v. Taggart, 5 Serg. & R. [Pa.] 19, 9 Am. Dec. 327; Foster v. Adams, 60 Vt. 392, 15 Atl. 169, 6 Am. St. 120.)

CONCLUSION.

Plaintiff seller and defendant buyer entered into an agreement for the sale of shares of stock, the terms of which are admitted.

Plaintiff seller admittedly fully performed his contract by transferring 200 shares of the City National Company

to defendant's nominee on December 6, 1935, on the admitted understanding that a contemporaneous delivery be made the morning of December 7, 1935, by defendant by delivering defendant's note for $13,125.00 in favor of plaintiff, the terms of which note were agreed on, and by delivery of the certificate of stock endorsed by defendant's nominee, and by further delivery of a consent of such nominee to the pledging of the shares of stock evidenced by such endorsed certificate.

Title and possession to the shares passed from plaintiff to defendant.

Defendant failed to perform by deliberately refusing to deliver the note and the endorsed certificate December 7, 1935, along with the consent, without lawful justification for such refusal. That attitude continued from that date on to February 9, 1936. Defendant on February 3rd continued his deliberate unjustified refusal in response to the demand on that date of plaintiff to make delivery. Plaintiff then employed local counsel to secure for plaintiff compensation for the breach of the contract. Plaintiff never waived his right to this compensation. He did offer to accept the return of the note and the certificate on February 9, 1936, on his reasonable request that defendant reimburse him the expenses he had been obligated to incur on account of defendant's refusal to deliver. All defendant would then or thereafter do, or has ever offered to do, was to deliver the note and the certificate of stock. Defendant's refusal to deliver on February 3, 1935, did not change in any respect the refusal of defendant to deliver prior to that time.

Plaintiff in no wise waived his right to compensation on February 3, when defendant then, as theretofore, refused delivery to plaintiff.

The contention of defendant that defendant is entitled to "specific performance," by which defendant means that plaintiff should be required by this Court to forego his

right of action for defendant's breach and to now accept and receive the note and the certificate, and to have this Court declare that such note due December 6, 1940, the agreed due date if the note had ever been delivered and the note had been extended on or prior to its due date December 6, 1938, is without merit. It is without merit because plaintiff is by law entitled, where title and possession to the thing sold have passed and defendant has failed to make agreed contemporaneous performance, to have compensation in money therefor. The law does not say that for breach of a contract of sale the seller is remitted for recovery to a delivery by the buyer of the note and the collateral whenever the buyer gets ready to deliver.

For anyone to recover in specific performance it is necessary for such person to allege *and prove*, first, the agreement of sale; second, the performance or willingness to perform by the one seeking specific performance at the agreed time, and, third, the refusal to perform at the agreed time by the one against whom specific performance is sought. Here every fact of performance is the reverse of any of the facts required for an action for specific performance, and demonstrates that the claim for specific performance is one that has no basis whatever. Here Baker, the seller in the supposed specific performance case, has fully performed by transfer of the shares. Here in the supposed specific performance case Nakdimen, the buyer, has deliberately refused, without justification, to perform. Under these circumstances the remarkable contention is made that Nakdimen, in the supposed specific performance case, who has wholly failed to perform, is entitled to compel Baker not to perform (because he had performed), but to waive the default of Nakdimen in failing to perform his part of the contract. In the case at bar we have shown that the plaintiff, Baker, for the deliberate, unjustified

breach by defendant, is entitled to compensation, measured by the face of the note agreed to be delivered by Nakdimen.

If equities are to be considered it should be remembered that Baker, a young man without experience, placed $20,000.00 in the stock in question; that he worked for a number of years with the understanding that he would receive a definite salary; that that salary was cut down from time to time until finally it was stated by defendant that he would not receive any more thereafter; that on December 6, 1935, under these conditions an agreement was entered into for the purchase price of the $20,000.00 face value of shares for $13,125.00, by the note in question, the difference representing the amount that had been theretofore paid Baker for his services. Having made this agreement the plaintiff in good faith transferred his stock as agreed, and defendant deliberately, and without any lawful justification for his conduct, refused to deliver the note and the endorsed certificate for the shares of security the next day, in accordance with the agreement, and continued this attitude of refusal for over two months, and then tendered delivery which he contends plaintiff should be obliged by this Court to accept as in full performance of defendant's obligation and that the case be dismissed.

It is respectfully submitted that plaintiff was entitled to recover, and that the judgment of the District Court, affirmed by the Court of Appeals, should be allowed to stand and that certiorari should be denied.

Respectfully submitted,

HAROLD B. SMALL,
THOS. B. PRYOR
Attorney for Respondent.

PRYOR & PRYOR,
CARTER & SMALL,
THOMAS B. PRYOR,
EMMET T. CARTER,
Of Counsel.